the Electronic Fund Transfer Act constitute congressionally-created public rights for which no jury right exists. *Id.*at 4, 6.

C. Procedural History

The Bureau initiated administrative proceedings against the Bank on July 6, 2019 for the above-listed consumer protection violations. *Id.* at 4. The parties proceeded to oral argument, and in early 2020, an administrative law judge (ALJ) at the Bureau issued a recommended decision against the Bank on all claims. *Id.* The Bureau's director affirmed. *Id.* at 4-5. This decision held the Bank liable for economic damages caused to consumers ($350,526.31 for the CFPA violation, $6,450,332.12 for the EFTA violation, and $1,339,036.15 for the FCRA violation), as well as for civil penalties in the amount of $4,155,500 for the CFPA violation. *Id.* Additionally, it enjoined the Bank from offering the APP services to consumers. *Id*. at 5. The Bank appealed, and a Twelfth Circuit panel affirmed the Bureau's findings. *Id.* The Bank appealed again, and the Twelfth Circuit, en banc, again rejected the Bank's arguments. The Bank then petitioned this Court for Certiorari. *Id.* Respondent Consumer Financial Protection Bureau urges this Court to affirm the findings of each of the lower courts.

DISCUSSION

I. The Consumer Financial Protection Bureau's use of an administrative judge does not violate the Seventh Amendment.

The Bureau did not violate the Bank's Seventh Amendment right by using an administrative law judge to assess fines against the Bank for engaging in unfair, deceptive, or abusive acts or practices (UDAAPs). The Seventh Amendment states that "In Suits at common law . . . the right of trial by jury shall be preserved[.]" U.S. Const. amend. VII**.** This right applies only to claims that arose in courts of law, rather than courts of equity, at the time of ratification. *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 449 (1977).

However, it does not attach to all claims that traditionally fell within courts of law. *See, e.g.*, *Granfinanciera v. Nordberg*, 492 U.S. 33, 52–53 (1989). A public rights exception permits adjudication of some common law claims without a jury, namely those claims that concern a public right. *See, e.g.*, *id.* The CFPA's prohibition on UDAAPs is neither a common law claim nor analogous to one. Nevertheless, even if such an analogy existed, the public rights exception applies.

A. The UDAAP ban is not a traditional common law claims nor analogous to one.

The CFPA's prohibition on UDAAPs is neither a common law claim nor a common law analogy, thus removing it from the ambit of the Seventh Amendment. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). The Seventh Amendment only applies where the type of claim at issue is a traditional common law claim–one that was tried in a court of law at the time of the founding– or where the claim at issue is analogous to such a traditional claim. *Id.*

The prohibition on UDAAPs is not a traditional common law claim. Traditional claims include trespass, trover, detinue and replevin, ejectment, covenant, debt, general assumpsit and fraud. 8 James Wm. Moore et al., *Moore's Federal Practice* § 38.110, LexisNexis (database updated 2022). Therefore, the Seventh Amendment's applicability to the CFPA claim at issue depends on the existence of a common law analogy. *See Markman*, 517 U.S. at 376.

However, none exists. In determining "whether a statutory action is more analogous to cases tried in courts of law than in courts of equity or admiralty, [the Court] examine[s] both the nature of the statutory action and the remedy sought." *Feltner v. Columbia Pictures*, 523 U.S. 340, 348 (1998). The common law claim most similar to the UDAAP ban is fraud, but the two are not analogous. *See Sutherland Bank*, 505 F.4th at 14. Therefore, the Seventh Amendment does not apply.

1. Common law fraud's intent requirement distinguishes it from the UDAAP ban.

The lack of an intent requirement differentiates common law fraud from this CFPA claim. While an analogy need not be identical, *Tull v. United States*, 481 U.S. 412, 421 (1987), mere similarity does not suffice. *Sutherland Bank*, 505 F.4th at 14.

Unlike fraud, the UDAAP ban encapsulates non-intentional action. 12 U.S.C. § 5531(c), (d). The CFPA specifically defines unfairness and abusiveness to require no showing of intent. 12 U.S.C. § 5531(c), (d). Likewise, deception requires no intent. Consumer Prot. Bureau, CFPB Consumer Laws and Regulations: UDAAP 7 (2022), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-actspractices-udaaps_procedures.pdf ("intent to deceive is not necessary for deception to exist."). In stark contrast, fraud is "the *intentional* misrepresentation of a material fact made *for the purpose* of inducing another to rely, and on which the other reasonably relies to his or her detriment." 37 Am. Jur. 2d *Fraud and Deceit* § 1, Westlaw (database updated August 2022) (emphasis added). This distinction undermines the existence of a common law analogy.

Furthermore, the canon of constitutional avoidance requires differentiating "deceptive acts and practices" from common law fraud. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018) (citing *Crowell v. Benson,* 285 U.S. 22, 62, (1932) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Here, when the UDAAPs provision is read distinctly from common law fraud, the Seventh Amendment question dissipates. *See Jennings*, 138 S.Ct. at 842; *see Markman,* 517 U.S. at 376.

2. The available relief for UDAAP violations further distinguishes deception from common law fraud.

In addition to the substantive differences between common law fraud and deception, the

relief authorized by the CFPA further distinguishes these claims. The CFPA authorizes numerous remedies, including recission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages or other monetary relief, public notification about the violation including cost, limits on activities, and civil monetary penalties. 12 U.S.C. § 5565(a)(2). These remedies are primarily equitable relief, including clearly equitable relief such as recission or reformation of contracts, restitution, disgorgement, public notification, and limits on activities and functions. 12 U.S.C. § 5565(a)(2); *see CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011).

Traditionally, suits for damages or debts fell in courts of law, while suits seeking specific relief fell in courts of equity. *Plechner v. Widener Coll., Inc.*, 569 F.2d 1250, 1258 (3d Cir. 1977) (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2311). While the CFPA authorizes payment of damages or other monetary relief and civil money penalties, 12 U.S.C. § 5565(a)(2), the fact that relief takes the form of a money payment does not automatically remove it from the category of traditionally equitable relief. *CIGNA Corp.*, 563 U.S. at 441. Equity courts provided relief in the form of "monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Id.* at 441–42. Courts of law, in contrast, provided "nothing other than compensatory damages[.]" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993).

The nature of relief sought therefore turns on whether the Bureau sought any relief other than compensatory damages. *See id.* It did. The Bureau sought injunctive relief, civil penalties, and economic damages for harm caused to consumers by the Bank. *Sutherland Bank*, 505 F.4th at 4–5. This collection of relief demonstrates that the Bureau sought more than just compensatory damages. *See Mertens*, 508 U.S. at 255.

Furthermore, the civil penalties assessed by the Bureau extend beyond mere compensatory damages. "[O]ne of the most basic interpretive canons," according to this Court, is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). As such, the civil monetary penalties authorized by the CFPA must be read distinctly from the damages or other monetary relief authorized by the same statute. *See Corley*, 556 U.S. at 314.

Construing the civil monetary penalties as act as a "surcharge" on violators for breaching their duties avoids such superfluity. *See CIGNA Corp.*, 563 U.S. at 442. The Bank, as a provider of retail banking, stock brokerage, insurance, and wealth management services to customers nationwide, has a fiduciary duty to its customers. FDIC, *Trust/Fiduciary Activities,* Banker Resource Center, https://www.fdic.gov/resources/bankers/trust-fiduciary-activities/. Historically, courts of equity imposed "surcharges" on holders of fiduciary duty that breached this duty. *CIGNA Corp*, 563 U.S. at 442. The Bureau treats these penalties as a surcharge by channeling the funds acquired into the Civil Penalty Fund, where it compensates eligible classes of harmed consumers and provides funding for consumer education and financial literacy. 12 C.F.R § 1075 (2022). The "damages" imposed by the ALJ against Sutherland essentially act as a "surcharge" against the bank for its breach of fiduciary duty to its customers and to the general public. It does not, as compensatory damages do, make the Bank's harmed customers whole.

B. Adjudication of CFPA claims fall within the public rights exception to the Seventh Amendment.

The Bank asserts that deception sounds in common law fraud, despite the lack of analogy, but the public rights exception nevertheless defeats the Seventh Amendment claim. This exception permits adjudication of common law claims without a jury when those claims fall within a

Congressionally-created public right. *See, e.g.*, *Atlas Roofing*, 430 U.S. 442. Two major factors govern the existence of a public right: if existing private remedies were inadequate prior to Congressional intervention, *see, e.g., id.*, and if the right at issue is closely integrated with a public regulatory scheme. *See, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985). Both of these factors apply to the UDAAP claims.

1. Private existing remedies for harmed consumers were inadequate.

Private remedies inadequately protected consumers prior to the passage of the Dodd-Frank Act, proving the existence of a public right. *See, e.g.*, *Atlas Roofing*, 430 U.S. 442. In *Atlas Roofing*, the Court held that the adjudicative process created by the Occupational Safety and Health Act of 1970 (OSHA), 84 Stat. 1590, 29 U.S.C. § 651 et seq, did not violate the Seventh Amendment. *Atlas Roofing*, 430 U.S at 461. That act imposed a "new statutory duty to avoid maintaining unsafe or unhealthy working conditions and empower[ed] the Secretary of Labor to promulgate health and safety standards." *Id.* at 444–45. Before passing this law, Congress conducted an investigation, concluding that "work-related deaths and injuries had become a 'drastic' national problem[,]" and that the existing remedies "[were] inadequate to protect the employee population from death and injury due to unsafe working conditions[.]" *Id.* In upholding OSHA's adjudicative power over seemingly private torts, the Court concluded that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law." *Id.* at 455.

The Bureau similarly remedies a pre-existing gap in the statutory scheme. Congress created the Bureau through the Dodd-Frank Act in response to the devastating 2008 financial crisis. As it had in its enactment of OSHA, Congress conducted extensive investigations, eventually concluding that "widespread failures in financial regulation and supervision proved devastating to

the stability of the nation's financial markets[.]" Fin. Crisis Inquiry Comm'n Final Report at xviii.[1] Just as Congress created OSHA in response to inadequate worker-protections, Congress created the Bureau in response to the inadequacies of the existing consumer protection structure.

2. The UDAAP ban is closely integrated with the federal consumer protection scheme.

Furthermore, the right of consumers to be free from unfair, abusive, or deceptive acts and practices is closely integrated with a public regulatory scheme, thus falling within the public rights exception. *Thomas*, 473 U.S. 568 at 594 (finding that the public rights exception includes cases involving "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution[.]").

Congress entrusted the Bureau with the enforcement of eighteen preexisting consumer financial protection statutes as well as the novel prohibition on UDAAPs. 12 U.S.C. §§ 5531, 5536. The regulatory scheme established by Dodd-Frank depends upon this consolidation. The government's "inconsistent response added to the uncertainty and panic in the financial markets" during the 2008 financial crisis and the haphazard, multi-agency oversight of existing consumer protection statutes exacerbated financial panic. Fin. Crisis Inquiry Comm'n Final Report at xvii, xxi.

The Bureau's enforcement data examples the practical integration of the UDAAP ban within the broader consumer protection scheme. CFPB, Enforcement Actions, https://www.consumerfinance.gov/enforcement/actions/. Every single case brought by the Bureau in 2022 alleged violations of the CFPA, usually alongside another consumer protection statute. *Id.* Seventeen of

[1] In 2009 Congress created the Financial Crisis Inquiry Commission as part of the Fraud Enforcement and Recovery Act. to "examine the causes, domestic and global, of the current financial and economic crisis in the United States." Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, § 5. The commission detailed its findings in the *Financial Crisis Inquiry Report.*

those twenty enforcement actions asserted UDAAPs, and only two cases involved stand-alone allegations of deceit. *Id.* In nearly every case brought by the Bureau for deceitful actions, the Bureau simultaneously enforced at least one other statute in conjunction with the CFPA. *Id.*

***

In conclusion, the Bureau's use of an ALJ to resolve UDAAP claims under the CFPA did not violate the Seventh Amendment. *See Markman*, 517 U.S. at 376. The CFPA ban on UDAAPs is not a traditional common law claim, and it lacks a common law analogy because the UDAAP ban does not contain an element of intent. *See id.*; 8 James Wm. Moore et al., *Moore's Federal Practice* § 38.110. Furthermore, the public rights exception renders the question of a common law analogy moot, because when it passed the CFPA ban on UDAAPs, Congress created a public right. 12 U.S.C. §§ 5531, 5536; *see Atlas Roofing*, 430 U.S. 442. For these reasons, the Bank's Seventh Amendment claim must fail.

II. The Bureau's dual-layer removal scheme for ALJs does not violate the separation of powers.

The Bank's separation of powers claim, too, must fail, because the dual-layer removal scheme for ALJs within the Bureau does not restrict the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; *See Humphrey's Ex'r v. U.S.*, 295 U.S. 602 (1935). ALJs within the Bureau and members of the Merit Systems Protection Board (the Board) are non-executive officers whose activities do not unduly interfere with the President's oversight power. *See Humphrey's Ex'r*, 295 U.S. 602.

By statute, administrative law judges receive removal protections through a two-layer scheme. 5 C.F.R. § 930.211 (2022); 5 U.S.C. § 1201 et seq. Removal of ALJs requires good cause, as determined by the Board, "after opportunity for a hearing[,]" 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211 (2022), and the removal of Board members by the President requires "inefficiency,

neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). The character and scope of duty of both the Board and Bureau ALJs permit this dual-layer protection scheme.

The ability of Congress to impose heighted removal protections depends in part "upon the character of the office." *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (citing *Humphrey's Ex'r*, 295 U.S. at 631, 655); *see, e.g.*, *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010) (invalidating a dual layer scheme when each layer involved wielded "significant executive power[.]"). Neither layer of officials involved in this removal process exercise significant executive power, rendering removal protections proper.

A. ALJs are non-executive, quasi-judicial officials.

The character of Administrative Law Judges authorizes removal protections. *See Morrison*, 487 U.S. at 687. ALJs are inferior officers, *Lucia v. SEC*, 138 S.Ct. 2044 (2018), who exercise quasi-judicial, non-executive power. Each of these characteristics independently permits heighted removal protections for ALJs. *See Morrison*, 487 U.S. at 691.

First, the position of ALJs as inferior officers within the executive branch warrants removal protections. The President does not wield unfettered power to freely remove inferior officers, particularly where the officers' discretion is not "central to the functioning of the Executive Branch[.]" *Id.* at 691–92. In *Morrison*, the Court approved removal protections for an inferior officer within the executive branch. *Id*. at 671. In doing so, the Court clarified factors that distinguish an "inferior" officer from a "principal," *id.*, which the Court later used to determine that ALJs are inferior officers. *Lucia v. SEC*, 138 S.Ct. at 2049.

In *Morrison*, the Court evaluated the removal protections within the Ethics in Government Act. 28 U.S.C. §§ 591–599 (1982 ed., Supp. V). The act "allow[ed] for the appointment of an 'independent counsel' to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws" and provided that the independent

counsel could only be removed from office by Congressional impeachment or by the Attorney General for "good cause, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such independent counsel's duties." *Morrison*, 487 U.S. at 660, 663. The Court found that "[a]lthough the counsel exercise[d] no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act," the Court "simply d[id] not see how the President's need to control the exercise of that discretion [wa]s so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691–2.

Secondly, ALJs are not purely executive officers, so the President's need to control the exercise of ALJ discretion is not "so central to the functioning of the Executive Branch," *id.*, as to require at-will ALJ termination. ALJs lack the power to issue final decisions; they may only issue recommended decisions to the Director of the Bureau, 12 C.F.R. § 1081.400 (2022), who is removable at will by the President. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183 (2020). As such, ALJs possess "purely recommendatory power," opposed to the "enforcement or policy making functions" wielded by other members of the executive branch. *Free Enterprise Fund*, 561 US at 507 n.10. The President remains free to, through his Bureau director, alter ALJ decisions and exercise sufficient control over the executive branch. *Compare Sutherland Bank*, 505 F.4th 1 (noting that the Bureau director may set aside any findings or conclusions of an ALJ) *with Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (invalidating a removal restriction when the executive officer "command[ed] the President himself to carry out" the officer's order "without the slightest variation[.]").

B. The Merit Systems Protection Board does not exercise executive power.

The second layer of the dual-layer scheme concerns the Merit Systems Protection Board. Although members of the Board are principal, rather than inferior officers,[2] *see Edmond v. United States*, 520 U.S. 651, 663 (1997), "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *See Free Enterprise Fund*, 561 U.S. at 843. Specifically, the Court permits this type of removal protection where the principal officers serve as members of a nonpartisan, independent, and non-executive body with staggered terms, created by Congress to "carry into effect legislative policies." *Humphrey's Ex'r*, 295 U.S. at 628. In these circumstances, the Court allows limiting removal to reasons of "inefficiency, neglect of duty, or malfeasance in office[.]" *Id.* at 624. These are the same reasons for which the President may remove Board members. 5 U.S.C. § 1202(d).

In addition to sharing the same removal standards, the Board shares each of the characteristics highlighted by the Court; the Board is also a nonpartisan, independent, and non-executive body with staggered terms that was created by Congress to "carry into effect legislative policies." *See* 5 U.S.C. § 1201. As such, the Constitution permits these removal protections. *See Humphrey's Ex'r*, 295 U.S. at 628.

1. The Board was created to carry into effect legislative policies and adjudicate claims.

The Constitution permits these removal protections because Congress created the Board to carry into effect legislative policies, namely the Merit Systems Principles. 5 U.S.C. § 2301(b); 5 C.F.R. 1200.1. The *Humphrey's Executor* Court reasoned that

[2] "'[I]nferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent."

> [t]he Federal Trade Commission[,] [a]s an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid . . . cannot in any proper sense be characterized as an arm or an eye of the executive.

Humphrey's Ex'r, 295 U.S. at 628. The Board, too, carries legislative policies into effect. Congress created the Board in 1978 to "ensure that all Federal government agencies follow Federal merit systems practices." 5 C.F.R. 1200.1.

Furthermore, the Board's primary adjudicatory role places it outside the executive. *See Wiener v. U.S.*, 357 U.S. 349, 356 (1958). The Board "is an independent Government agency that operates like a court" and "adjudicates individual employee appeals and conducts merit system studies." *About MSPB*, U.S. Merit Systems Protection Board, https://www.mspb.gov/about/about.htm.

The Constitution does not directly confer Presidential removal power over "a member of an adjudicatory body . . . merely because [the President] want[s] his own appointees on such a Commission[.]" *Wiener*, 357 U.S. at 356. The ability of a body to hear claims and issue final decisions that are not subject to review by any other official or court indicates adjudicatory power. *See id.* at 354–55. Likewise, the Board hears and adjudicates claims over which it exercises the power of final decision, 5 U.S.C.A. § 1204 (a)(1), and therefore "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Ex'r*, 295 U.S. at 628; *see Wiener*, 357 U.S. at 354–55.

2. Congress intended the Board to be a non-partisan, independent commission.

Furthermore, Congress intended the Board to be a non-partisan, independent commission, which takes the Board outside of the President's direct control. *See Humphrey's Ex'r*, 295 U.S. at 629 (finding that Congress possesses the constitutional authority to create "quasi legislative or

quasi judicial agencies, [and] to require them to act in discharge of their duties independently of executive control[.]"). Some agencies conduct tasks that "require absolute freedom from Executive interference," *Wiener*, 357 U.S. at 353, because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.* To determine the necessity of freedom from the Executive, the Court considers the nature of the function that Congress vested in the agency at issue. *Id.*

The appointment process for Board members demonstrates that Congress intended independence. 5 U.S.C. §§ 1201–02; *see Humphrey's Ex'r*, 295 U.S. at 624. In *Humphrey's Executor*, the Court upehld for cause removal protections of FTC commissioners because Congress intended the commission to be independent. *Humphrey's Ex'r*, 295 U.S. at 624. The Court reasoned that Congress composed the FTC of commissioners serving seven-year staggered terms, " so arranged that the membership would not be subject to complete change at any one time[.]" *Id.* Likewise, members of the Board serve seven-year staggered terms. *See* 5 U.S.C. §§ 1201–02; 5 C.F.R. § 1200.2. As the President serves a term of four years, U.S. Const. art. II, § 1, no President can appoint his own Board majority in a given term, demonstrating Congress's intent that the Board would not be subject to complete change by any one President. 5 C.F.R. § 1200.2; *see Humphrey's Ex'r*, 295 U.S. at 624.

At-will removal of Board members would erode this independence. *Cf Morrison*, 487 U.S. at 687–88 ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'"). Because the Board wields jurisdiction over various subjects that could put the Board at odds with the President, *see, e.g.*, 5 C.F.R. § 1200.10 (2022), removal protections safeguard the Board from conflicts of interest, notably in cases concerning the President's

executive officers or political allies. *See Wiener*, 357 U.S. at 353. For example, the Board has original jurisdiction over alleged violations of the Hatch Act, which prohibits federal employees from using their official authority or influence to affect the outcome of an election. 5 C.F.R. § 1201.121 (2022); 5 U.S.C. § 7323. As the President is an elected official and political leader, these types of claims could create conflict between the President and the Board.[3] Consider a civil servant who inappropriately campaigns for the President's re-election. The President, under the Bank's proposed at-will removal power, could simply dismiss the Board members who would sanction his supporter, putting pressure on the Board to obey the President's wishes instead of the Merit Systems Principles. *See Wiener*, 357 U.S. at 353. Congress structured the Board as to insulate it from such undue influence, and therefore, the Constitution permits heightened removal protections. *See Morrison*, 487 U.S. at 687–88

C. The removal process remains exclusively in the Executive Branch.

Additionally, the Constitution permits this dual-layer removal process because the removal power remains within the Executive Branch. *See Morrison*, 487 U.S. at 686. In *Bowsher*, the Court invalidated an act which made an executive officer "removable not by the President but only by a joint resolution of Congress or by impeachment[.]"478 U.S. at 728. Similarly, in *Myers*, the Court invalidated a removal scheme requiring the Senate to consent to removal. *Myers v. United States.*, 272 U.S. 52, 106, 176 (1926). Conversely, the removal scheme at issue in *Morrison* "put[] the removal power squarely in the hands of the Executive Branch; an independent counsel [could] be

[3] Hatch Act allegations typically begin in the Office of Special Counsel, which diverts the official accused of violating the act to the Board for proceedings, unless that official was nominated by the President and confirmed by the Senate. 5 U.S.C. 1215. Upon a finding by the Office of Special Counsel that an official who was appointed by the President and confirmed by the Senate violated the Hatch Act, the office refers them not to the Board, but rather to the President. 5 U.S.C. 1215(b).

removed from office, 'only by the personal action of the Attorney General, and only for good cause." *Morrison*, 487 U.S at 686. For this reason, the Court upheld the *Morrison* scheme. *Id.*

Likewise, in creating the Bureau, Congress kept the removal process for ALJs in the Bureau "squarely in the hands of the Executive Branch" under the Merit Systems Protection Board. *Id.*; 5 U.S.C. § 7521(a). The removal process for Board members also remains in the hands of the Executive Branch, as only the President may remove them for the enumerated reasons. 5 U.S.C. § 1202(d). As such, the Constitution permits this removal process.

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For each of these reasons, the dual-layer removal scheme does not violate the separation of powers as it applies to officers that wield no executive power. ALJs are quasi-judicial, inferior officers, and because the Bureau director, whom the President may remove at-will, may unilaterally reverse ALJ decisions, the President remains free to "take care" that the law be faithfully executed. 12 C.F.R. § 1081.400 (2022); *Seila L. LLC,* 140 S.Ct. 2183. The Board, too, is non-executive. It is a quasi-judicial body that operates like a court in order to "carry into effect" the Merit Systems Principles. *See* 5 U.S.C. § 2301(b); 5 C.F.R. 1200.1. For each of these reasons, the Bank's separation of powers claim must also fail.

III. Conclusion

The 2008 financial crisis did not only cost Americans millions of dollars— it harmed "real people and real communities." Fin. Crisis Inquiry Comm'n Final Report at xvxvi–vii. In an effort to safeguard the American public from further harm, Congress enacted the ban on unfair, deceptive, or abusive acts and practices. The Bank nevertheless deceived American consumers, and now attempts to escape accountability, unconcerned about the damage it leaves in its wake. The Consumer Financial Protection Bureau urges this Court to affirm.

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Journal(s)	**Law Review**
Moot Court Experience	**No**

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June 12, 2023

The Honorable Juan Sanchez
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Dear Judge Sanchez:

I am writing to apply for a clerkship in your chambers for any term starting on or after August 2024. I am a rising third-year student at New York University School of Law where I am on the Law Review. Despite facing the sudden death of my father in August 2022, I stayed involved as an active member of my law school community and served as a teaching assistant for Civil Procedure. I spent four years of undergrad in Philadelphia at the University of Pennsylvania and would be delighted to come back for a clerkship.

A resume, law school transcript, law school grading policy, and writing sample are enclosed. My writing sample is an excerpt of a bench memorandum I wrote during my judicial internship at the United States Court of International Trade. Letters of recommendation from my recommenders will follow. My recommenders are:

Helen Hershkoff, Professor of Law, New York University School of Law
Jonah Gelbach, Professor of Law, University of California, Berkeley School of Law
Anna Arons, Acting Assistant Professor of Lawyering, New York University School of Law
The Honorable Gary S. Katzmann, United States Court of International Trade

I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,

/s/

Soomin Shin

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Unofficial GPA: 3.59
Honors: *New York University Law Review*, Online Editor
Intesa Sanpaolo Research Scholar
Activities: Professor Helen Hershkoff, Research Assistant (Summer 2022)
Professor Helen Hershkoff, Teaching Assistant in Civil Procedure (Fall 2022)
Asian Pacific American Law Students Association, Community Activism Chair

UNIVERSITY OF PENNSYLVANIA, COLLEGE OF ARTS AND SCIENCES, Philadelphia, PA
Bachelor of Arts in Philosophy, Politics, and Economics, *summa cum laude*, May 2019
Awards: Award for Academic Excellence in Philosophy, Politics, and Economics
Sphinx Senior Honor Society Award for Outstanding Campus Leadership
Senior Thesis: *Challenges to Institutionalism in Assigning Duties Toward Climate Justice*

EXPERIENCE

SELENDY GAY ELSBERG PLLC, New York, NY
Summer Associate, May 2023 – July 2023
Participate in aspects of complex commercial litigation, including research for motions and oral argument.

INSTITUTE FOR POLICY INTEGRITY AT NYU LAW, New York, NY
Student Advocate, January 2023 – May 2023
Wrote memo on environmental justice ramifications of hydrogen energy and Inflation Reduction Act provisions. Advocated for more comprehensive cost-benefit analysis through writing comment letter in response to Environmental Protection Agency's proposed rulemaking to regulate water emissions from power plants.

U.S. COURT OF INTERNATIONAL TRADE, New York, NY
Judicial Intern, Hon. Gary Katzmann, May 2022 – July 2022
Wrote bench memo with analysis and proposed disposition for case regarding antidumping tariffs on imported goods into the United States. Prepared oral argument questions and post-argument memoranda.

SOCIÉTÉ GÉNÉRALE CORPORATE AND INVESTMENT BANKING, New York, NY
Investment Banking Analyst, July 2019 – August 2021
Investment Banking Summer Analyst, June 2018 – August 2018
Created and analyzed financial models for renewable energy and infrastructure assets. Wrote internal risk approval memoranda for new transactions and annual reviews. Communicated with key members across compliance and environmental teams to ensure that transactions adhered to firm's sustainability strategy.

U.S. DEPARTMENT OF JUSTICE, Washington, DC
Intern, *Environmental Crimes Section*, May 2016 – August 2016
Summarized meetings and edited legal memoranda for the prosecution of Volkswagen AG and associated executives for emissions cheating system, resulting in guilty plea.

ADDITIONAL INFORMATION

Fluent in Korean. Volunteer with Asian American tenants' organization in New York City. Enjoy hiking, Asian American literature, and classical music.

Name:	**Soomin Shin**
Print Date:	**06/02/2023**
Student ID:	**N19881242**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Torts	LAW-LW 11275	4.0	B+
Instructor: Cynthia L Estlund			
Procedure	LAW-LW 11650	5.0	A+
Instructor: Jonah B Gelbach			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Stephen Holmes, David M Golove			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	B
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Roderick M Hills			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Sheldon Andrew Evans			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Stephen Holmes, David M Golove			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Quantitative Methods Seminar	LAW-LW 10794	2.0	A
Instructor: Daniel L Rubinfeld, Katherine B Forrest			
Environmental Law	LAW-LW 11149	4.0	B
Instructor: Richard L Revesz			
Legal History Colloquium	LAW-LW 11160	2.0	A
Instructor: David M Golove, Daniel Hulsebosch, Noah Rosenblum			
Evidence	LAW-LW 11607	4.0	B
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Regulatory Policy Clinic Seminar	LAW-LW 10105	2.0	A-
Instructor: Max R Sarinsky			
Regulatory Policy Clinic	LAW-LW 11029	3.0	A
Instructor: Max R Sarinsky			
Regulation of Banks and Financial Institutions	LAW-LW 11550	4.0	A-
Instructor: Michael Ohlrogge			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Maggie Blackhawk			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

Staff Editor - Law Review 2022-2023

End of School of Law Record

2L Grades Addendum

Two weeks before the 2L fall semester started in August 2022, my father suddenly passed away and I became the administrator to his estate. I dealt with estate matters in North Carolina as well as in South Korea. I balanced classwork and law school commitments with managing his estate and taking time to grieve, but I could not devote as much emotional and mental energy to my coursework as I did during my 1L year.

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

United States Court of International Trade
One Federal Plaza
New York, NY 10278

CHAMBERS OF
Gary S. Katzmann
JUDGE

Dear Judge,

I write on behalf of Soomin Shin, who has applied to your Chambers for a law clerk position. Soomin worked for me as an intern in the summer of 2022. I am pleased to support her application with great enthusiasm and without reservation. She will be an outstanding law clerk.

I write with the perspective of well more than 18 years on the bench, serving twelve years as an Associate Justice on the Massachusetts Appeals Court and, now nearly seven years as a Judge on the United States Court of International Trade. Soomin is the holder of a B.A. degree, summa cum laude in Philosophy, Politics and Economics from the University of Pennsylvania, College of Arts and Sciences. As an undergraduate, she was the Chair of Penn's Asian Pacific Student Coalition, moderating conversations on racial justice and cultural sensitivity. Prior to law school, she worked as an investment banking analyst for two years with an international banking organization, focusing on renewable energy and infrastructure. At the same time, she was a volunteer for the Asian Tenants Union, checking in on those Korean immigrants who were in need of guidance regarding housing resources and policies. Thereafter, in 2021, Soomin entered the New York University School of Law.

In the summer of 2022, Soomin worked for me as an intern. Although she had completed just one year of law school, her great ability and work ethic, buttressed by substantial writing experiences prior to law school, combined to produce excellent work. I assigned her a very challenging international trade case, requiring mastering a complex administrative record, analyzing numerous briefs, navigating a myriad of difficult issues of substantive law, jurisdiction and procedure, and the capacity to comprehend and analyze complex arithmetic formulae. Extraordinarily conscientious, Soomin approached each issue with utmost thoroughness. She also did an excellent job drafting questions that were sent to the attorneys in advance of oral argument. She wrote a comprehensive bench memorandum that set out the questions carefully and in a balanced way addressed the positions of the litigants. Soomin writes clearly and concisely. She showed precocious analytical ability and the capacity to parse complicated arguments. Her memorandum was very useful to me as I considered how the case should be adjudicated. I very much valued our discussions. Throughout her work for me, Soomin showed herself to be a person who embraces suggestions and is responsive to ideas. Remarkably efficient, she is also a self-starter who has the quiet confidence to ask questions. She is earnest and humble. It was a pleasure to work with her. I can say that she made a great contribution to the work of Chambers.

Given Soomin's talents, it is not surprising that she has produced an excellent record in law school, while also serving as an online editor of the New York University Law Review, as well as a research assistant and a teaching assistant to a law school professor.

Born in Korea and an immigrant to this country at the age of three, Soomin has honored her roots and life story, and demonstrated deep commitment to the ideal of freedoms and opportunity. I am pleased to recommend Soomin Shin with great enthusiasm and without

reservation. She no doubt will have an outstanding career in the law and in service to the world around her. I am happy to chat further. Please do not hesitate to contact me at (212) 264-1757.

Very truly yours,

Judge

Berkeley Law

Jonah B. Gelbach
Herman F. Selvin Professor of Law
University of California, Berkeley
School of Law
790 Simon Hall
Berkeley, CA 94720
(202) 427-6093 (cell)
gelbach@berkeley.edu

June 12, 2023

RE: Soomin Shin, NYU Law '24

Your Honor:

I write to enthusiastically recommend **Soomin Shin** for a judicial clerkship in your chambers. She will be outstanding, and you should hire her.

I know Soomin because she was my student in my 1L civil procedure course at NYU Law, where I was a Visiting Professor, in the Fall 2021 semester. Soomin was one of only two students, out of 98, who earned an A+ grade in my class.

Soomin did a nice job answering questions when she was on call in my class, and we also had engaging conversations in office hours and after class. In addition, I got to further observe Soomin's smarts and diligent work ethic when she worked as a research assistant for Professor Helen Hershkoff and me in the summer of 2022 on a project related to U.S. District Courts' Local Rules. Unfortunately, a family tragedy cut short Soomin's work with us that summer, though I believe she continued working with Professor Hershkoff. Were I in a position to work with Soomin again, I would be more than happy to do so.

Although I did not have a formal writing requirement for the course Soomin took—as usual for a required 1L course, grades were based on the final exam score—it's clear to me from our correspondence and contacts since then, as well as her research assistance, that she is a skilled and organized writer. I have no doubt that Soomin will excel at the writing aspects of a judicial clerkship.

I got to know Soomin outside of class as well. Partly that was through discussions she initiated regarding research and future career interests. In addition, she and several teammates performed very well in Quizzo-style competitions that I held several times to help make it fun for my students to learn key Federal Rules and federal statutes. These were voluntary events that occurred over Zoom in the evenings, with multiple-choice questions. High-performing teams got their choice between lunch on me and drinks on me (no group ever chose lunch).

Soomin's team won that prize at least once, and perhaps more than that, and we had very interesting conversations.

Soomin's activities in college, between college and law school, and in law school demonstrate her analytical skills, her strong commitment to public service, and her focus on environmental and climate-related considerations. She worked as a summer intern for DOJ's Environmental Crimes Section in 2016, concentrating on the prosecution of Volkswagen for its emissions frauds. After college, she spent two years working for Société Générale Corporate and Investment Banking as an investment banking analyst on financial models for renewable energy and related to infrastructure. She has also been an active advocate for Asian community members in New York generally and at NYU Law in particular, where she has served as Community Activism Chair of the Asian Pacific American Law Students Association. In addition, she spent the summer of 2022, following her 1L year, as a judicial intern for the Hon. Gary Katzmann of the U.S. Court of International Trade in New York.

Soomin's career interests include working as a litigator, with a particular interest in impact litigation, though I can imagine she might also find working in policy-related jobs of interest. I know she also has potential interests in academia. Working as a judicial clerk will help position her for such endeavors. She has demonstrated substantive interests in environmental, banking, and housing law, and I expect that as a judicial clerk, she will find most substantive areas of the law engaging. Her broad interests, combined with her demonstrated high ability in procedure, will make her a particularly excellent district court clerk, though I also think she will be a fine choice for an appellate clerkship.

On a personal level, Soomin is pleasant, engaging, and interesting to talk with. She will be a congenial addition to any chambers fortunate enough to have her.

In sum, Soomin will be a great clerk, and I strongly recommend that you hire her.

Yours,

Jonah B. Gelbach

NYU LAW

ANNA ARONS
Acting Assistant Professor
Lawyering Program

Impact Project Director
Family Defense Clinic

NYU School of Law
245 Sullivan Street, C24
New York, NY 10012-1301
P: 212 992 6152
M: 530 574 6790
anna.arons@nyu.edu

May 31, 2023

RE: Soomin Shin, NYU Law '24

Your Honor:

I write to recommend Soomin Shin for a clerkship in your chambers. I taught Soomin in Lawyering, an intensive yearlong course, during the 2021-2022 academic year. From this experience, I know her to be a deft researcher and a clear writer, an incisive, curious, and engaged critical thinker, and a generous and thoughtful peer to her classmates. I am confident that she would bring these same outstanding qualities to a clerkship and I recommend her enthusiastically and without reservation.

The Lawyering Program is a key part of the first-year curriculum at NYU. It is a year-long course in which students study the actual practice of law, looking closely at the interactive, fact-sensitive, and interpretive work that is fundamental to excellence in practice. Over the year, students develop legal research and writing skills, alongside practice skills typical to most real-world legal practice, such as interviewing and counseling clients, finding and assessing facts, and negotiating with counterparties. Outside of class sessions, students meet with me regularly throughout the year, both one-on-one and in small groups, to reflect on their progress and to practice self-critique and peer critique. The year culminates with a unit in which students research and draft a brief, complete several rounds of moots, then argue their brief in front of a practicing lawyer. In each of these dimensions, Soomin distinguished herself from her classmates.

From the start, Soomin stood out in my class of 32 students for her legal analysis and writing. In written assignments, she consistently identified the relevant caselaw, triaged her arguments strategically, clearly and concisely explained the doctrine, and effectively and persuasively showed its application to her facts. It was a joy to watch her skills deepen over the course of the year. She enthusiastically embraced the "growth mentality" that I encourage in all of my students and was notable in her receptiveness to feedback and her excitement about improving her skills. She more than once sought out additional rounds of feedback on written assignments and additional opportunities to practice skills like oral argument, beyond those required for the course. Her dedication paid off, and by the end of the year, I found her writing to be far ahead of what I expect from first-year students.

Soomin's participation in class and in smaller group meetings likewise reflected her well-developed critical thinking skills. She regularly moved beyond surface-level understanding of course materials, raising questions in class and in office hours about lawyers' roles and ethical obligations and concerns about biases reflected within the legal profession and legal system. She was eager to share insights from her experiences with Asian American activism, and she connected our class discussions to legal and non-legal advocacy opportunities outside class – and

promoted those opportunities to her classmates. I should note, too, that she never stepped on others' toes in these discussions; instead, she displayed commendable self-awareness and left ample room for other students to participate. Unsurprisingly, she shows this same thoughtfulness outside of Lawyering: I had the pleasure of speaking with her extensively regarding her Note on financial regulation and climate change, and she brought the same inquisitiveness and sharp thinking to that endeavor as well.

Finally, and perhaps most important, Soomin was a pleasure to teach and an asset to her peers. She is conscientious, generous, and thoughtful, not to mention self-motivated and fully dedicated to all that she takes on. In peer critiques, she offered substantive but empathetic feedback, and received feedback from others gracefully as well. Soomin's outlook is all the more remarkable, given that over the last two years, Soomin has dealt not only with shared stressors like the pandemic and the transition to law school, but also a significant and unexpected loss in her family that placed additional responsibilities on her shoulders during her 2L year. Through it all, she maintained a healthy sense of perspective and displayed impressive strength. No matter what is on her plate, her poise, forthrightness, and preparedness—not to mention her dry sense of humor—have carried her through.

If you have any questions or would like any additional information, I am more than happy to talk further. I can be reached on my cell phone at 530-574-6790 or, until July 1, by email at anna.arons@nyu.edu. Following that date, I will be joining the faculty at St. John's University School of Law, but I remain available to provide additional information and can be reached then at aronsa@stjohns.edu.

Sincerely,

Anna Arons

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

June 5, 2023

Dear Judge:

I am very pleased to recommend Soomin Shin for a judicial clerkship with you following her graduation from New York University School of Law in May 2024. She is a member of the Law Review and offers an unusual combination of demonstrated academic and professional excellence, resilience, and commitment.

I was introduced to Soomin through Professor Jonah Gelbach, with whom she studied civil procedure when he visited at NYU. She performed exceptionally well in the course and I enthusiastically hired her to work as a Research Assistant. Her project pertained to federal court local rules, and consisted of two parts. First, she researched the origins of the Local Rules and their relation to Federal Rule of Civil Procedure 16; then she analyzed how district courts have approached their use of pretrial conferences with respect to discovery in the wake of the *Twombly* and *Iqbal* pleading decisions. Along the way, she assembled a comprehensive data base of each district court's Local Rules. For the historic origins, she examined the Advisory Committee notes for the Federal Rules drafts, Proceedings of the Institute on Federal Rules, law review articles, and notes to the 1983 Federal Rules amendments. Her research memos discussed such topics as the competing values of flexibility and conformity that informed the crafting of the Local Rules. For district courts' current practices, she looked through dockets and court orders, focusing on the Eastern and Southern Districts of New York, and tentatively concluded that the judges in these districts decline to use Federal Rule 27 in conjunction with Federal Rule 16 and Local Rules as a pretrial fact gathering device, except when the evidence is at impending risk of being destroyed. Soomin showed herself to be a careful and prodigious researcher, and I was exceptionally pleased to work with her.

Soomin was not my student, but I am impressed by the diversity of fields in which she has excelled. She received an A+ in Civil Procedure, and an A in Quantitative Methods, in Law of the Regulatory State, in Criminal Law, and in the Legal History Colloquium. Based on her excellent record and after an interview via Zoom, I invited Soomin to serve as a Teaching Assistant in my 1L Procedure course, and in that capacity she was part of a team of 2L students responsible for organizing review sessions at the end of different units. Each TA also met weekly with no more than ten 1L students to go over problems, discuss that week's lessons, and field questions (whether related to the course or to the 1L experience itself). My students adored working with Soomin—she not only is smart and proficient, but also kind, patient, and empathetic.

Soomin graduated summa cum laude from the University of Pennsylvania in 2019 where she received the Award for Academic Excellence in Philosophy, Politics, and Economics. Her senior thesis, Challenges to Institutionalism in Assigning Duties Toward Climate Justice, reflects her interest in financial institutions and market regulation as a means of social improvement and for mitigation of environmental and climate hazards. After college she worked as a banking analyst, and at NYU Law, she was selected to be an Intesa Sanpaolo Junior Research Scholar (the only second-year student selected her fellowship year) to undertake original research. Her project compares central banks' regulatory tools to mitigate climate change, focusing on structural differences among the U.S. Federal Reserve, European Central Bank, Bank of England, and Bank of Japan, and seeks to explain the challenges of introducing "green" monetary policy to the U.S. Federal Reserve.

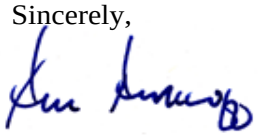
In addition to her work on the Law Review and with me, Soomin has contributed to the NYU Law and broader community in important ways. During 1L year, she energized the Law and Political Economy Association, organizing the "LPE 101" series, which introduced students to critical perspectives on the 1L curriculum. She also participated in the Tenant Defense Collective, through which she helped tenants file applications for the COVID-19 Emergency Rental Assistance program. In addition, after the attacks and murder of Asian American women (including on the subway), Soomin organized a forum for students to discuss safety concerns and opportunities to collaborate with other Asian organizations in NYC. These discussions led to the formation of the new Community Advocacy Chair position on the APALSA board, and during 2L Soomin assumed that responsibility. In this role, she has jump-started collaborations and service projects with local organizations, including: a letter-writing workshop for free meal delivery packages for food-insecure Asian elders living in NYC; organizing student volunteers with the Asian American Legal Defense Fund for voter exit polls for the midterm elections; and running a care-package making event for recently-arrived asylum seekers in Brooklyn.

Soomin was born in Korea and together with her parents and younger sister immigrated to North Carolina when she was three-years old. The family speaks Korean at home and Soomin says that the household follows Korean customs. Soomin's demonstrated academic excellence is all the more remarkable given the terrible family tragedy she experienced while at NYU Law: her father died unexpectedly of a heart attack and without a will, and Soomin served as the administrator to his estate. Her fortitude, resilience, and energy during this difficult period, while excelling in her course work and contributing to our community, are enormously impressive and show great strength of character.

Soomin brings a wonderful set of qualities and skills to her application for a judicial clerkship. I recommend her with the greatest of enthusiasm and with deep confidence in her future.

I would be happy to answer any questions you might have. Thank you for your consideration.

Sincerely,



Helen Hershkoff

This writing sample is an excerpt of a bench memorandum I wrote during my judicial internship at the United States Court of International Trade in the summer of 2022. All private party names have been replaced with "Companies AB" and "Companies CD" and confidential details have been redacted. This writing sample reflects only minimal editing by one of the law clerks for redacting information. This writing sample is provided with the express permission of Judge Gary S. Katzmann's chambers and should not be distributed.

The bench memorandum from which this sample is excerpted involved the U.S. Department of Commerce's antidumping determination for goods, referred to as "widgets," from a foreign country, referred to as "Foreign Country." This excerpt includes discussion of one issue, which involves whether Plaintiffs have standing to bring their claim challenging Commerce's use of a statistical test, the Cohen's *d* test, in calculating the antidumping margin.

NATURE OF THE CASE

This case involves the Department of Commerce's ("Commerce") determination of appropriate antidumping ("AD") margins for the importation of widgets from Foreign Country into the United States. Plaintiffs, Companies AB, are foreign producers and exporters of widgets. Pls.' 2nd Am. Compl. at 2, Aug. 6, 2021, ECF No. 22. Defendant-Intervenors, Companies CD, include companies that are U.S. producers of widgets and certified labor unions that represent the U.S. widgets industry. Def.-Inters.' Compl. at 2, July 12, 2021, ECF No. 13.

JURISDICTION AND STANDARD OF REVIEW

The jurisdiction of federal courts is limited to "actual cases or controversies," and Plaintiffs have the burden of establishing that jurisdiction is appropriate. Royal Thai Government v. United States, 38 CIT __,__, 978 F.Supp.2d 1330, 1332 (2014) (first citing McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936), and then citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)). To establish a case or controversy pursuant to Article III of the United States Constitution, a plaintiff must have standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.") To establish standing, a plaintiff is required to show "injury in fact" that is "fairly traceable to the challenged action" and that is likely, as opposed to merely speculatively, to be redressed by a favorable decision. Id. at 560–61 (internal quotation marks and brackets omitted). A prevailing party "may not appeal the proceeding just because he disagrees with some of the findings or reasoning." Royal Thai, 2014 CIT __, __, 978 F.Supp.2d 1330, 1333 (citing Freeport Minerals Company v. United States, 758 F.2d 629, 634 (Fed. Cir. 1985)). The jurisdiction of the federal courts under Article III of the United States Constitution is to issue dispositive opinions, not advisory opinions. Camreta v. Greene, 563 U.S. 692, 717.

BACKGROUND

A. Legal and Regulatory Framework for Antidumping Duty Determinations Generally

Dumping occurs when a foreign company sells goods in the United States at a lower price than the company charges for the same product in its home market. Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1046 (Fed. Cir. 2012). This practice constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below reasonable fair market value. Id. at 1046–47. To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and, if necessary, to issue orders instituting duties on subject merchandise. Id. When Commerce concludes that duties are appropriate, the agency is required to determine margins as accurately as possible. Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Pursuant to 19 U.S.C. § 1673, Commerce imposes AD duties on foreign goods if it determines that the goods are being, or are likely to be, sold at less than fair value, and the International Trade Commission ("ITC") concludes that the sale of the merchandise below fair value materially injures, threatens, or impedes the establishment of an industry in the United States. Diamond Sawblades Mfrs. Coal. v. United States, 866 F.2d 1304, 1306 (Fed. Cir. 2017). Merchandise is sold at less than fair value when the normal value ("NV") is greater than the price charged for the product in the United States. 19 U.S.C. § 1673.

Commerce generally determines NV by reference to market prices in the exporting country. 19 U.S.C. § 1677b(a)(1). If there does not exist a viable home market or third country market to serve as the basis for NV, Commerce uses constructed value ("CV") as the basis for NV pursuant to 19 U.S.C. § 1677b(a)(4). CV is calculated by adding the costs of production and processing

with the costs incurred by the exporter under investigation in the course of the export and sale of the product. Id. § 1677b(e). 19 U.S.C. § 1677b(f) provides rules for the calculation of cost of production and CV.

B. Calculation of Dumping Margins and Cohen's *d* test

To calculate the weighted average dumping margin in an AD investigation, there are three methodologies that Commerce may use as provided by 19 U.S.C. § 1677f–1(d). First, Commerce can compare the weighted average of the CVs to the weighted average of the export prices, a method known as the average-to-average ("A-to-A") method. Id. § 1677f–1(d)(1)(A)(i). In general, Commerce will use the A-to-A method unless the Secretary determines another method is appropriate in a particular case. 19 C.F.R. § 351.414(c)(1). Commerce is also empowered to compare the CVs of individual transactions to the export prices of individual transactions, a method known as the transaction-to-transaction ("T-to-T") method. Id. § 1677f–1(d)(1)(A)(ii). Commerce employs the T-to-T method only in "unusual" situations, such as "when there are very few sales of the subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2). Finally, in exceptional cases where "there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and . . . the administering authority explains why such differences cannot be taken into account" using the A-to-A or T-to-T method, Commerce may use the average-to transaction ("A-to-T") method, in which it compares the weighted average of the CVs to the export prices of individual transactions. 19 U.S.C. § 1677f–1(d)(1)(B).

Commerce has found that targeted dumping is more likely to occur when export prices fit a pricing model that differs significantly among different periods of time, different purchasers, or different regions of the United States. See Stupp Corp. v. United States, 5 F.4th 1341, 1345 (Fed.

Cir. 2021); Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722 (Dep't Commerce May 9, 2014). Congress provided for the use of the T-to-T or A-to-T methods to address the kind of targeted dumping that the A-to-A method sometimes fails to detect. Stupp, 5 F.4th 1341, 1345 (citing Apex Frozen Foods Private Ltd. v. United States, 862 F.3d 1337, 1341 (Fed. Cir. 2017) ("Apex")).

To determine whether to apply the A-to-T or T-to-T method instead of the A-to-A method, Commerce conducts what is called a differential pricing analysis. Apex, 862 F.3d 1337, 1340–41 (Fed. Cir. 2017); see also Differential Pricing Analysis. In the first step of the differential pricing analysis, Commerce segments export sales into subsets based on region, purchasers, and time periods. Stupp, 5 F.4th 1341, 1346; Differential Pricing Analysis at 26,722. Commerce then applies the Cohen's *d* test, a statistical test determining effect size, to each subset to evaluate the extent to which prices differ significantly among purchasers, regions or time periods. Stupp, 5 F.4th 1341, 1346–1347; Stanley Works (Langfang) Fastening Systems Co. Ltd. v. United States, 41 CIT __, __, 279 F. Supp. 3d 1172, 1178–1179 (2017); Differential Pricing Analysis, 79 Fed. Reg. at 26,722–23. If the Cohen's *d* coefficient is 0.8 or greater, the sales in the group "pass" the Cohen's *d* test. Stupp, 5 F.4th 1341, 1347; Differential Pricing Analysis at 26,723.

Commerce then applies the "ratio test" on the aggregated results of the Cohen's *d* test on each subset to assess the extent of the significant price differences for all sales. Stupp, 5 F.4th at 1347. If less than 33 percent of the value of total sales passes the Cohen's *d* test, Commerce will use the A-to-A method to calculate the weighted-average dumping margin. Id. If more than 33 percent but less than 66 percent of the value of total sales pass the Cohen's *d* test, Commerce has the discretion to apply a hybrid method, wherein it applies the A-to-A method to sales which do not pass the Cohen's *d* test, and the A-to-T method to sales which pass the Cohen's *d* test. Id.

Next, Commerce applies the "meaningful difference" test comparing the AD margins resulting from different methodologies to examine whether using only the A-to-A method can appropriately account for price differences, pursuant to 19 U.S.C. § 1677f–1(d)(1)(B)(ii). Stupp, 5 F.4th at 1347; Stanley Works, 41 CIT __, __, 279 F. Supp. 3d 1172, 1179. Under this test, Commerce compares the margin that results from only applying the A-to-A method with the margin that results from the Cohen's *d* and ratio tests. Stupp, 5 F.4th at 1347. A difference in the weighted-average AD margins is considered meaningful if (1) there is a 25 percent relative change where both rates are above the de minimis threshold of two percent or (2) the resulting weighted average dumping margin moves across the de minimis threshold. Id. at 1347. If Commerce considers there to be a meaningful difference, it uses the alternative approach to calculate the AD margin. Id. at 1347; Differential Pricing Analysis at 26,723. If Commerce concludes that there is no meaningful difference, it applies the A-to-A method. Stupp, 5 F.4th at 1347.

C. Factual and Procedural History

On March 31, 2020, Defendant-Intervenors filed a petition with Commerce regarding the importation of widgets from Foreign Country. [[Citation Redacted]]. In April 2020, Commerce published an initiation notice for the less-than-fair value investigation of widgets from Foreign Country, covering the January 2019 to December 2019 period of investigation ("POI"). See id. In May 2020, Commerce selected Companies AB as mandatory respondents. See [[Citation Redacted]]. Commerce then calculated a preliminary AD margin of [[ ]] percent for Companies AB. See Preliminary Decision Memo ("PDM") at 6.

In its Preliminary Determination, Commerce conducted a differential pricing analysis and found that [[ ]] percent of the value of Plaintiffs' sales pass the Cohen's *d* test. PDM at 10; see also [[Citation Redacted]] at 3 ("Amended Final Determination Memo"). Commerce explained in

its PDM the stages of the differential pricing analysis. PDM at 9. In applying the "ratio test," Commerce found that the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounted for more than 33 percent and less than 66 percent of the value of total sales, which supported its application of the hybrid A-to-A and A-to-T methods to calculate the dumping margin. PDM at 10. However, Commerce determined that there was no meaningful difference between using the A-to-A method and a hybrid method on the weighted-average dumping margin, and thus used the default A-to-A method to calculate the AD margin instead of an alternative method. Id. at 10.

Plaintiffs did not challenge this finding in their case brief after the PDM, and Commerce continued to use the A-to-A method in its Final Determination and Amended Final Determination. See Pls.' Case Br.; [[Citation Redacted]] at 2; Amended Final Determination Memo at 2. In the Amended Final Determination Memo, Commerce found that, like the PDM, [[ ]] percent of the value of U.S. sales pass the Cohen's *d* test, "confirming the existence of a pattern of prices that differ significantly among purchases, regions, or time periods." Id. at 2. It then found that the weighted-average dumping margin produced by the three methodologies were as follows:

- A-to-A method: [[ ]] percent
- Hybrid method (A-to-T for sales which pass the Cohen's *d* test, A-to-A for sales which do not pass the Cohen's *d* test): [[ ]] percent
- A-to-T method: [[ ]] percent

Id. at 2. Commerce thus concluded there was no meaningful difference between the weighted-average dumping margins calculated using the A-to-A method and alternative methods, and applied the A-to-A method for all of Plaintiffs' U.S. sales, resulting in a final amended dumping margin of [[ ]] percent. Id. at 3.

Both Plaintiffs and Defendant-Intervenors timely challenged Commerce's Amended Final Determination. [[Citations Redacted]].

DISCUSSION

Because Plaintiffs fail to demonstrate an injury-in-fact that is linked to the application of the Cohen's *d* test, they lack standing to bring this claim. Consequently, the court lacks jurisdiction and should dismiss this claim.

Plaintiffs argue that Commerce's application of the Cohen's *d* test in the first step of its differential pricing analysis was not in accordance with law. Pls.' Br. at 52. Plaintiffs allege that "Commerce failed to explain whether the sales data conformed with the underlying assumptions necessary for the Cohen's *d* test," in particular, "whether the test and comparison groups were normally distributed, equally variable, and equally numerous." Pls.' Br. at 55. Specifically, Plaintiffs argue that the Stupp decision, issued after the Final Determination, requires Commerce to explicitly address each of these underlying assumptions. Id. In Stupp, the Federal Circuit remanded the decision to Commerce "to explain whether the limits on the use of the Cohen's *d* test . . . were satisfied in this case." Stupp, 5 F.4th at 1360. In their reply brief, Plaintiffs also argue that judicial economy supports remanding Commerce's application of the Cohen's *d* test because continued application of the Cohen's *d* test could require additional rounds of briefing. Pls.' Reply Br. at 25–26.

The Government asks the court to grant a motion to dismiss Plaintiffs' claim as Plaintiffs have failed to show an injury-in-fact resulting from Commerce's methodology. Def.'s Br. at 46–47. The Government contends that a difference in Commerce's methodology would not have materially impacted the result of the dumping margin, so Plaintiffs lack standing to bring a claim. Id. Alternatively, the Government highlights that Plaintiffs failed to raise arguments about the

differential pricing analysis in its original case brief before Commerce, and thus failed to exhaust administrative remedies as required by 28 U.S.C. § 2637(d). Def.'s Br. at 53–54.

Plaintiffs rely on Stupp Corp. v. United States, 5 F.4th 1341, 1345 (Fed. Cir. 2021) to challenge Commerce's application of the differential pricing analysis. Pls.' Br. at 55. In Stupp, the Federal Circuit remanded Commerce's application of the Cohen's *d* test after plaintiffs challenged Commerce's explanation of its use of the hybrid A-to-A/A-to-T method to calculate the weighted average dumping margin where more than 33 percent but less than 66 percent of the value of total sales passed the Cohen's *d* test. Stupp, 5 F.4th at 1348. In the underlying investigation at issue in Stupp, Commerce's application of the Cohen's *d* test had a material impact of the results of the AD investigation. Id. at 1360. In addition, the holding in Stupp justified remand of subsequent cases in which Commerce's application of the alternative A-to-T method or hybrid method had a material impact on the calculation of the weighted-average dumping margin. See, e.g., Nexteel Co. v. United States, 28 F.4th 1226 (Fed. Cir. 2022); SeAH Steel Co. v. United States, 45 CIT __, __, 539 F. Supp.3d 1341 (2021); Marmen Inc. v. United States, 45 CIT __,__, 545 F. Supp. 3d 1305 (2021).

Similarly, the Mid Continent line of cases require Commerce to "provide an explanation that is adequate to enable to court to determine whether the choices are in fact reasonable, including as to calculation methodologies." Mid Continent Steel & Wire, Inc. v. United States, 31 F.4th 1367, 1376–1377 (Fed. Cir. 2022) (citing Mid Continent Steel & Wire, Inc. v. United States, 940 F.3d 662, 667 (Fed. Cir. 2019)). However, Defendants-Cross-Appellants in Mid Continent challenged Commerce's use of the hybrid A-to-A/A-to-T methodology instead of the A-to-A methodology which would be used without application of the differential pricing methodology.

Mid Continent, 31 F.4th at 1370. As the Federal Circuit confirmed, "what is at issue" in Mid Continent was therefore the application of the alternative A-to-T method. Id.

The bases for remand present in Stupp nor Mid Continent are not applicable to the present case. Here, unlike Stupp and Mid Continent, Plaintiffs do not argue that Commerce should have applied a methodology different from the A-to-A methodology that it used to calculate the AD margin in the Preliminary Determination and Final Determination. See Pls.' Br, Pls.' Resp. to the Court's Questions at 24. Although Plaintiffs correctly note that Stupp requires Commerce to explain its underlying assumptions in applying the Cohen's *d* test, they do not allege that the AD margin would be changed on remand on this issue. Pls.' Br. at 55. Thus, Plaintiffs fail to show that an injury would be redressed by a favorable decision. Lujan, 504 U.S. 555, 560.

Further, while Plaintiffs correctly note that the Cohen's *d* test "may produce an upward bias" and "tend[] to artificially inflate the dumping margins for a set of export sales prices that has minimal variance, citing Stupp, 5 F.4th at 1358–59, they likewise do not explain how Commerce's application of the Cohen's *d* test in the present case produced such upward bias or inflation of dumping margins. Indeed, after conducting a differential pricing analysis, Commerce found that the pattern of export prices can be accounted for using the statutory default A-to-A method in 19 U.S.C. § 1677f-1(d)(1)(A)(i). See Amended Final Analysis Determination at 2–3. Commerce did not employ the A-to-T method or hybrid method that was "at issue" in Mid Continent in its calculation of the dumping margin in either the Preliminary or Final Determinations, but rather used the A-to-A default method. Mid Continent, 31 F.4th 1367, 1370. In other words, Commerce implemented the same weighted-average dumping margin as would result without a differential pricing analysis and Cohen's *d* test. Id. at 3.

Without an injury-in-fact that is "traceable to the current action", Plaintiffs do not have standing to appeal the proceeding just because they disagree with Commerce's explanation of assumptions in the Cohen's *d* test. Royal Thai, 2014 CIT __, __, 978 F.Supp.2d 1330, 1333. Remanding on Commerce's' explanation of the Cohen's *d* test will not change the dumping margin, and therefore there is no injury redressed by a favorable decision on this count. Lujan, 504 U.S. at 560–61.[1]

If the court grants the Government's motion to dismiss Count IV for lack of subject matter jurisdiction, it need not reach the Government's alternative argument that Companies AB failed to exhaust its administrative remedies per 28 U.S.C. § 2637(d). Without standing, the court also need not address whether Commerce failed to act in accordance with law.

Likewise, the court does not need to reach Plaintiff's argument in its reply brief that judicial economy supports remand of this issue. Pls.' Reply Br. at 25–26. Unlike ASEMESA v. Untied States, 44 CIT __, 429 F. Supp. 3d 1325, Slip Op. 20-8 (Jan. 17, 2020), where plaintiffs were able to demonstrate injury-in-fact related to a particular claim, which supported remand based on judicial economy, here the Plaintiffs fail to demonstrate standing on this claim, as explained in the above section. Furthermore, Plaintiffs' reliance on Stratoflex Inc. v. Aeroquip Corp., 713 F.2d 1530, 1539 (Fed. Cir. 1983) to support remand on basis on judicial economy is unconvincing. Stratoflex seems to support that position that without a change in result, as is the case because Plaintiffs fail to allege injury-in-fact and standing, remand would be against judicial economy. Id.

[1] If, on remand, Commerce does not apply the A-to-A method to calculate dumping margins, Plaintiffs "will still have a right to challenge that redetermination . . . either during the course of any remand or in a new suit, even if this case is dismissed at this juncture." Royal Thai, 978 F.Supp.2d at 1334 (citation omitted).

at 1539 ("The result being unchanged, a remand for reconsideration of the evidence would in this case constitute a waste of resources for the courts and the parties.")

Ultimately, the court should grant Defendant's motion to dismiss Count VI of Plaintiffs' complaint regarding Commerce's application of the Cohen's *d* test, as Plaintiffs have failed to demonstrate injury-in-fact traceable to the application of the Cohen's *d* test and have no standing as to Count VI.

Applicant Details

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Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 18, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Caroline (Care) Shoaibi

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June 12, 2023

The Honorable Juan R. Sánchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am writing to request your consideration of my application for a clerkship beginning in the fall of 2024. I am a rising third-year law student at the University of Pennsylvania Carey Law School.

Throughout my time in law school, I have developed strong skills in legal research, analysis, and writing. As a judicial intern during my 1L summer, I harnessed those skills in a fast-paced and high stakes environment. I conducted research and drafted opinions regarding a wide variety of legal matters, including administrative, criminal, and international law. Additionally, my experience as an editor for the *University of Pennsylvania Law Review* has sharpened my attention to detail in my writing and legal analysis. I will continue to improve these abilities during my 3L year by taking courses in federal courts, conflict of laws, and advanced legal research. I have also been selected to serve as a Littleton Fellow, a position in which I will teach the fundamentals of legal writing, research, and communication to a cohort of 1L students as part of their required Legal Practice Skills coursework. This experience will further enhance my own skillset in these areas.

I have enclosed my resume, transcripts, and writing sample. Letters of recommendation from Judge Stephanos Bibas (juristdeacon@protonmail.com), Professor Karen Tani (ktani@law.upenn.edu), Professor Sarah Pierce (pierce3@law.upenn.edu), and Professor Kim Ferzan (kferzan@law.upenn.edu) are also included in this packet. Please let me know if any other information would be useful. Thank you for your time and consideration.

Respectfully,

Care Shoaibi

Encls.

Caroline (Care) Shoaibi

2201 Chestnut Street Apt. 504, Philadelphia, PA 19103 | (703) 895-6773 | cshoaibi@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D. Candidate, May 2024
Honors: Senior Editor, *University of Pennsylvania Law Review*; National Moot Court Team; Keedy Cup Moot Court Competition Quarterfinalist; Arthur Littleton Fellow (Legal Writing Instructor); Legal Practice Skills Honors
Activities: Research Assistant for Professor Karen Tani; Teaching Assistant for Professor Robert Cohen (Course: Anatomy of a Divorce); SeniorLAW Center Pro Bono Volunteer

The Wharton School of the University of Pennsylvania, Philadelphia, PA
Certificate in Management, March 2023

University of Virginia Frank Batten School of Leadership and Public Policy, Charlottesville, VA
Master of Public Policy, May 2019
Capstone: Improving Community-Wide Utilization of Primary Care Services in the Thomas Jefferson Health District, prepared for the Charlottesville Free Clinic
Activities: Teaching Assistant for Economics of Public Policy I and II; Research Assistant for the Global Policy Center

University of Virginia, Charlottesville, VA
B.A. in Economics; minor in Women, Gender, and Sexuality, May 2018
Honors: Phi Beta Kappa; Raven Society; Order of Omega; Intermediate Honors; Phi Eta Sigma
Activities: University Guide Service (Probationary Chair—Senior Leadership Position); Sustained Dialogue; Sexual Violence Prevention Coalition; Green Dot Bystander Intervention

EXPERIENCE

Cravath, Swaine, & Moore LLP, New York, NY — May - July 2023
Summer Associate – Litigation

U.S. District Court, Washington, DC — May - July 2022
Judicial Intern for the Honorable Rudolph Contreras
Drafted opinions, conducted legal research, reviewed citations, and observed hearings and trials.

Milken Institute, Washington, DC — Sept. 2019 - June 2021
Center for Public Health Associate
Provided research support for projects in the fields of chronic disease, sustainable food systems, and mental health. Contributed to reports regarding systemic public health consequences of COVID-19.

The Century Foundation, New York, NY — June - Aug. 2018
Nonprofit Management Intern
Researched funding prospects and wrote grant proposals for the education and foreign policy divisions.

SELECTED PUBLICATIONS

Shah, Roesler & Shoaibi. "Tracking What Matters: How to Address Critical WIC Needs during a Public Health Emergency." Milken Institute, 4 Dec. 2020, https://milkeninstitute.org/report/tracking-what-matters-how-address-critical-wic-needs-during-public-health-emergency.

Shoaibi, Care. "Health Care Policy." Virginia Policy Review, vol. 12, no. 2, 2019, pp. 101-110, www.issuu.com/virginiapolicyreview/docs/toprint-vpr_volume_xii_issue_ii_digital_issue.

INTERESTS

Settlers of Catan; Risk; Recreational softball, basketball, and volleyball; Persian history and culture.

Record of: Caroline L Shoaibi
Penn ID: 41202951
Date of Birth: 21-DEC
Date Issued: 11-MAY-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
INSTITUTION CREDIT:					
Fall 2021					
Law					
LAW	500	Civil Procedure (Wang) - Sec 3	4.00	A-	
LAW	502	Contracts (Hoffman) - Sec 3	4.00	A-	
LAW	504	Torts (Tani) - Sec 3B	4.00	A	
LAW	510	Legal Practice Skills (Pierce)	4.00	H	
LAW	512	Legal Pracitce Skills Cohort (Leibson)	0.00	CR	
Ehrs: 16.00					
Spring 2022					
Law					
LAW	501	Constitutional Law (Roosevelt) - Sec 3B	4.00	A	
LAW	503	Criminal Law (Ossei-Owusu) - Sec 3	4.00	A-	
LAW	510	Legal Practice Skills (Pierce)	2.00	H	
LAW	512	Legal Pracitce Skills Cohort (Leibson)	0.00	CR	
LAW	601	Administrative Law - 1l (Lee)	3.00	A	
LAW	734	Reproductive Rights and Justice (Roberts)	3.00	A	
Ehrs: 16.00					
Fall 2022					
Law					

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	5550	Professional Responsibility (Bibas)	2.00	A-	
LAW	6020	Employee Benefits (Lichtenstein/Zimmerman)	2.00	A+	
LAW	6070	Antitrust (Hovenkamp)	3.00	A	
LAW	6310	Evidence (Ferzan)	4.00	A	
LAW	7190	Anatomy of a Divorce (Cohen)	2.00	A	
LAW	8020	Law Review - Associate Editor	1.00	CR	I
Ehrs: 14.00					
Spring 2023					
Law					
LAW	5500	Business Management for Lawyers (Wharton Cert)	3.00	CR	
LAW	6220	Corporations (Knoll)	3.00	A+	
LAW	7480	Criminal Procedure: Prosecution and Adjudication (Bibas)	3.00	A	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
LAW	8130	Appellate Advocacy Preliminary Competiton (Gowen)	1.00	CR	
LAW	9000	International Women's Human Rights (de Silva de Alwis)	3.00	A+	
Ehrs: 13.00					

********** TRANSCRIPT TOTALS **********

	Earned Hrs
TOTAL INSTITUTION	59.00
TOTAL TRANSFER	0.00
OVERALL	59.00

********** Comments **********

Senior Writing Requirement - Fulfilled through

********** CONTINUED ON PAGE 2 **********

Comments continued:
International Women's Human Rights (de Silva de
Alwis)
********** END OF TRANSCRIPT **********

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Caroline Shoaibi

Dear Judge Sanchez:

Caroline Shoaibi, a rising 3L at the University of Pennsylvania Carey Law School, is applying for a clerkship in your chambers. She is thoughtful, poised, articulate, and very sharp. She'd make an excellent law clerk, and I'm delighted to recommend her to you.

Ms. Shoaibi is one of Penn's finest. A grandchild of Persian immigrants, she excelled at the University of Virginia, graduating Phi Beta Kappa and being inducted into UVA's most prestig-ious honor society. She also put her commitment to women's issues into practice, working on several efforts to prevent sexual violence. After earning her master's in public policy, she spent two years working on public health. Then she came to Penn Law and took it by storm. She has earned an A-range grade in every single graded class so far, including three A+s, not to mention Honors in legal writing. And she is not only an editor on Penn's law review, but also a research assistant and a pro bono volunteer.

I have personal knowledge of Ms. Shoaibi's strong performance. She took professional re-sponsibility with me last fall and the bail-to-jail criminal procedure class with me this past spring. (I teach part-time at Penn Law; my day job is as an appellate judge on the Third Circuit.) In and out of both classes, she was consistently well-prepared. She asked thoughtful questions and al-ways had good responses whenever I cold-called on her.

Ms. Shoaibi did extremely well in both classes. Last fall, in professional responsibility, hers was the second-best oral midterm and the third-best final exam, earning her the third-best per-formance overall and the highest A-. (Most of my colleagues would have given her an A, but I am a stingy grader.)

This spring, Ms. Shoaibi did even better. She tied for the best performance on my optional oral midterm, with a poised, measured, and confident performance that hit all the key issues. And on the final exam, comprising two complex issue-spotters totaling twenty-two pages under time pressure, she was also strong. On each question, she spotted almost all the relevant issues and analyzed them well. Far too many students simply assert their conclusions, but she mar-shalled the facts well and used them concretely to argue her positions. Her second answer was almost half a standard deviation above average, and her first was more than one-and-a-half standard deviations above it. On both questions, her writing and organization were excellent. In sum, hers was the sixth-best exam performance in the whole criminal procedure class, earning her an A. Based on these strong performances, I'm confident that she has the intellect, ability, maturity, and sound judgment to be a strong law clerk.

I've also had the pleasure of getting to know Ms. Shoaibi a bit outside of class, over coffee and in my office. I've consistently found her to be thoughtful, extremely pleasant, and easy to get along with. She hopes to serve the public as a prosecutor. I very much hope that you'll inter-view her and hire her.

Cheers,

Hon. Stephanos Bibas
Senior Fellow
sbibas@law.upenn.edu
(267) 299-4080

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Caroline Shoaibi

Dear Judge Sanchez:

I am delighted to recommend Caroline Shoaibi for a clerkship. Caroline was a student in my Evidence class, wherein she received an A. Caroline is extremely bright, inquisitive, and collaborative. She will make a fantastic law clerk.

Caroline was a terrific student. I teach Socratically, and Caroline was a consistent and strong participant in class. She also had one of the very best exams across both the analytically rigorous multiple choice and the standard issue spotter. Even in a particularly accomplished and competitive class, her multiple choice score was more than a standard deviation above the mean, and her essay was almost two standard deviations above the mean. She is able to think and to write clearly and concisely under significant time pressure. Simply put, she's exceedingly bright.

She will also be a tremendous asset in chambers. She is even keeled and easy going, and it is clear that she gets along well with her peers and professors. She also approaches law school with a collaborative intellectual interest. Her favorite thing about her classes is getting to know her professors and how they approach legal questions, and she is the kind of student who won't let a confusion with the material sit and fester. Instead, she will come to office hours to unpack her confusion. Of course, every time Caroline came to office hours with a question, it was because she had discovered some subtle anomaly in the doctrine. I found I learned from her as often as she learned from me!

As a law professor, one of the best parts of my job is that I get to meet people who are as emotionally intelligent as they are intellectually gifted, and I get to watch them grow into spectacular lawyers. I have no doubt that Caroline is one of those students, and that she will be the kind of law clerk whom you are delighted to work with each day and to see flourish in her career.

I recommend her without reservation.

Sincerely,

Kimberly Kessler Ferzan
Earle Hepburn Professor of Law
Tel 215-573-6492
kferzan@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Caroline Shoaibi

Dear Judge Sanchez:

I write this letter in enthusiastic support of Caroline ("Care") Shoaibi's application to be your law clerk. I have known Care as a student since the start of her law school career. Since early 2022, she has also worked as my research assistant. Through these interactions, I have developed a deep appreciation for Care's intelligence, judgment, work ethic, and professionalism. I believe that Care will make a phenomenal law clerk and I recommend her to you without reservation.

I first encountered Care in the Fall of 2021, when she was a student in my Torts class. This was a semester when masks were mandatory at Penn Carey Law and we had to minimize in-person interactions, all of which made it challenging for me to get a good sense of my students. And yet I quickly saw that Care was special. When I called on her, she was always well prepared and eager to dig into the assigned material. I also found that I could count on Care during those times when I chose not to "cold call" bur instead asked for volunteers (something I would do, for example, if I was worried that a question was particularly challenging, or when I simply wanted to generate a variety of viewpoints on an issue). While in no way dominating these opportunities, Care reliably participated. Her insightful contributions helped the class move through complex material in a productive, collaborative way. I also got to know Care through "Zoom" office hours, which she regularly attended. During these convenings, I appreciated Care's thoughtful questions, positive attitude, and sheer enthusiasm for learning law.

At the end of the semester, after evaluating all exams in an anonymized fashion, I was unsurprised to find that Care had done exceptionally well. For context, my exam includes a multiple choice component, an issue-spotter essay question, and a policy question. For each of these components, Care's exam was at or near the top of the distribution. Indeed, she achieved a perfect score on the policy question—a rare feat. Translated into knowledge and skills, this means that not only did Care display mastery of the doctrines that I had taught, but she also showed good, lawyerly judgment; she wrote effectively and persuasively; and she demonstrated an ability to think at a more abstract or conceptual level about tort law's animating logics.

Care's performance in my class was no aberration. First-year courses at Penn Carey Law are graded on a strict curve, making it difficult for even strong students to achieve consistently high marks. Care received "A" or "A-" grades in all her graded first-year courses. She also received "Honors" in both semesters of legal writing, a designation that is available to no more than 30 percent of the class. Even more impressive, Care has maintained these grades even as her extracurricular commitments have increased. (In fact, in one class, she surpassed her previous achievements and earned a rare "A+".) In short, Care's academic record at Penn Carey Law is simply stunning. Add to this her pre-law record of academic achievement—including an honors-filled undergraduate record from the University of Virginia, as well as a Masters in Public Policy—and there can be no doubt that Care has the intelligence and commitment that a top-tier clerkship requires.

I am even more confident in Care because of what I have seen of her as a research assistant. Having gotten to know Care in Torts and appreciated both her preparedness and her aptitude for the subject, I asked her and two of her study partners if they wanted to work as research assistants for me in Spring 2022. The main project I had in mind for them was an update to my Torts casebook (co-authored with John Fabian Witt). Care and her fellow RAs helped me by doing close readings of the entire book, looking for everything from typos to outdated citations. I also asked them to flag for me areas that, from a student perspective, could be clearer. And I invited them to suggest new topics for the casebook to cover. Care's contributions to this effort were invaluable. For example, she read and summarized law review articles and cases for me, so that I could update the notes following the main cases and potentially add new cases to the book. She also helped me think about whether and how to integrate contemporary issues into the casebook, such as Texas's SB8 law (incentivizing private enforcement of the state's abortion restrictions) and the concussion litigation against the National Football League (which raised interesting questions about the use of race in damage calculations).

During that spring semester and in the months afterward, Care also helped me with other research projects, on topics ranging from U.S. federalism to the tort of "wrongful life." Care has terrific research skills, is good at learning new skills (for example, she learned how to do archival newspaper research in order to assist me), and is adept at both synthesis and finer-grained presentations of findings. On a professional level, I appreciated that Care was consistent, reliable, and self-motivated. I could count on her to complete tasks when she said she would do so and also to help the entire group of RAs stay organized. Care also always made clear that she welcomed feedback on her work and was available to answer any follow-up questions that I had.

Giving me further confidence in Care's potential as a law clerk is her embrace of opportunities to build practical legal skills and show leadership. At Penn Carey Law, Care has participated in moot court (our Keedy Cup competition), through which she worked on both brief writing and oral arguments. She is also a member of the Law Review. Next year, she will serve as a Littleton Writing Fellow, a highly sought-after opportunity within our legal writing program. Littleton Fellows are a combination of teaching assistants and mentors to our 1L students. In my experience, only students with exceptional writing skills and "people skills" are

Karen Tani - ktani@law.upenn.edu

chosen for this program.

Care has also done considerable work outside of Penn Carey Law to gain the kind of practical and professional skills that are necessary for a clerkship. Prior to entering law school, she worked for two years at the Miliken Institute, a nonprofit, non-partisan think tank. This position allowed her to hone her research and writing while grappling with complex and potentially polarizing public policy issues. Also under her belt is the significant writing experience that her Masters program required, including a detailed proposal that she wrote for the Charlottesville Free Clinic to help its leadership understand the implications of Virginia's Medicaid expansion. Since starting law school, Care has continued to develop important skills. She has interned for a federal district court judge (the Honorable Rudolph Contreras in the District of Columbia) and will soon work as a summer associate at a major law firm (Cravath, Swaine, & Moore). And throughout her time in law school, she has volunteered for the SeniorLAW Center, through which she interacts with senior citizen clients and connects them to free legal help.

I can also convey with confidence that Care understands and values the special kind of opportunity that a clerkship represents. Moreover, I know that for her, it is much less about prestige than it is about training, experience, and public service. Her aspiration is to become a litigator, with enough generalist training to be comfortable with all kinds of cases. Eventually, Care hopes to work as a lawyer for the government, following a career trajectory that she has admired in other members of her family. Care understands that for this particular career path, clerking will be invaluable. In short, I think that Care has great reasons for applying for a position in your chambers and that, if given the opportunity, she will embrace it with eagerness, sincerity, and gratitude.

I will wrap up this letter by telling you a bit more about what Care is like as a person. I hope to give you a sense of the intangible qualities that are less apparent from her application materials but that she would bring to your chambers, if you give her the chance. First, Care is a good team player and a good leader. She is in no way aggressive or sharp-elbowed, but she understands how to get a group organized and stay on task, while maintaining collegiality. Second, she is thoughtful and introspective. My sense is that students of her generation have felt a lot of pressure to be hyper-visible to their peers in what they stand for, or stand against, and Care has put a lot of thought into how she wants to "show up" in the world. (Being in Charlottesville during the infamous 2017 "Unite the Right" rally was a formative experience for Care, I think.) Following an incident of apparent injustice, I wouldn't necessarily expect Care to be holding a megaphone at a public rally, but I would expect her to be present in a more understated way—having conversations, lending the moral authority of her presence, and trying earnestly to figure out how to be part of the solution. Third, Care is mature in her approach to law and to life. Although she has all the energy and passion that I love to see in my law students, she also looks for the "bigger picture," appreciates complexity (that is, she does not get upset when something isn't "black or white"), and gives grace to others. She is someone I would count on to be the "adult in the room" in any context that required it.

In closing, I believe that Care Shoaibi would be an outstanding law clerk. Thank you for reading this letter and for giving her application your close consideration. It is a pleasure to recommend her to you and I would be happy to talk about her in more depth, if that would be helpful to you. Please do not hesitate to be in touch.

Sincerely,

Karen Tani
Seaman Family University Professor
Professor of Law / Associate Professor of History
E-mail.: kmtani@gmail.com

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Caroline Shoaibi

Dear Judge Sanchez:

It gives me great pleasure to recommend Caroline Shoaibi for a clerkship in your chambers. I first met Care in the fall of 2021, when she was assigned to my year-long, first-year Legal Practice Skills class at the University of Pennsylvania Carey Law School. Care will likewise be working closely with me in her third year as a Littleton Fellow in the Legal Practice Skills program.

The Legal Practice Skills program at Penn Carey Law School is the course designed to most simulate the practice of law. It is challenging and intensive, but balanced by in-depth, individualized feedback and a focus on growth and development through that feedback. The LPS course is year-long and incorporates difficult federal legal problems—Fourth Amendment custodial interrogations, intellectual property matters, civil rights cases under 42 U.S.C. §1983—and requires students to communicate their legal analyses on these matters in memoranda, briefs, orally in supervisor meetings, orally before a federal court, and in negotiations with a partner and opposing counsel. At all stages, first-year law students receive feedback from their LPS professor and their Littleton Fellow—a third-year law student who has applied for and been accepted in a highly-competitive process for the position.

Care's work as a first-year law student in my class was excellent from the very first week of class, and only improved from there. Care was at all times a diligent student, following along closely and participating in the classroom discussion. When the room would get quiet in response to a question from me, I always knew that I could look to Care to contribute in a meaningful way that started a deep and thoughtful conversation. Moreover, Care was excited by and interested in each and every assignment—she got the thrill and satisfaction from solving a complex client problem through research and writing that signals a bright future lawyer (and a satisfied one!). Her work was always polished, professional, timely. But was also deeply thought through and well-researched. Care's work covered every major legal argument that could be made, found the most helpful cases to support those arguments, and explained her analysis to the reader in a direct, concise, and organized manner. Moreover, Care always identified the arguments that were not the most obvious, but that could win the matter for the client—and was thoughtful in her organization to give these more tangential arguments space without crowding out the most straightforward lines of analysis. As a careful reader of Care's work, I always felt that she was truly guiding the reader through the law in a helpful, logical, and compelling way. She understands the purpose and objective of legal analyses and how to best present those analyses to a reader.

Care received Honors in my course, which was an easy decision to make. She was top of the class in writing, and deeply engaged in all experiential (and other) aspects of the course. The headline comment from her Fellow and me on her last assignment—a summary judgment brief—from her first year read: "This brief was extraordinarily well done. And was clearly the product of significant research, critical thought, and excellent editing. Your work this Fall was likewise excellent, and the brief indicates that your skills have only grown from there." Care is simply an excellent law student and legal writer.

During Care's second year, I asked her to consider applying to be a Littleton Fellow for her third year. Littleton Fellows are the best and brightest of Penn Carey Law. They are chosen for their excellent writing abilities and their academic success. But they are also chosen for their ability to explain difficult concepts to brand new law students; to lead a classroom with both confidence and humility; to find out the answers to hard questions on their own and then actually answer those questions for their students. They are mentors and role models to first-year law students. The faculty and administration at Penn Care Law lean on Littleton Fellows to engage with first and second-year students, to meet with alumni and supporters of the law school, to serve on faculty committees, and to serve our community as stewards and young leaders.

To my great delight, Care applied for this position—and it was an easy "yes" from the faculty. We place tremendous trust in our Littleton Fellows to teach, critique, and mentor first-year students, and to work closely with their faculty member in the hard work of providing feedback and support for our students. Care has more than earned this trust—through her excellent academics, her deep love for learning, her acceptance and incorporation of feedback, and her strong writing skills. I am so happy to work with Care in her final year of law school as Littleton Fellow, and her future students will be very lucky to have her as a Fellow.

Care is an excellent legal writer and future lawyer but is also a person that I truly enjoy working closely with—she is mature, kind, thoughtful, and funny. She will make an excellent clerk, and I recommend her wholeheartedly.

Sincerely,

Sarah E. Pierce
Denise A. Rotko Associate Dean, Legal Practice Skills
Academic Director, Capstone Program, Carey JD/MBA

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Caroline (Care) Shoaibi

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Writing Sample

The attached writing sample is an opinion that I wrote as a judicial intern for the Honorable Rudolph Contreras of the United States District Court for the District of Columbia. In this case, the plaintiff sued her former employer for sex discrimination and retaliation, and the employer moved for summary judgment. This opinion denies that motion. Prior to publication, this opinion received light editing and review from other employees in the Judge's chambers and Judge Contreras himself. Per Judge Contreras's writing sample policy, this version was pulled directly from the public D.C. District Court website without any excerpting or additional editing.

I am submitting the attached writing sample with the permission of Judge Contreras.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKISHA VAUGHAN,	:		
	:		
Plaintiff,	:	Civil Action No.:	20-2932 (RC)
	:		
v.	:	Re Document No.:	17
	:		
CAPITAL CITY PROTECTIVE SERVICES II, LLC,	:		
	:		
Defendant.	:		

MEMORANDUM OPINION

DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR HEARING

I. INTRODUCTION

Plaintiff Lakisha Vaughan, former employee of defendant Capital City Protective Services II, LLC ("Capital City"), brought suit in this Court alleging discrimination based on sex and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ("Title VII"), the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 ("DCHRA"), and the Prince George's County Code, as authorized by Maryland Code § 20-1202. Compl. ¶ 1, ECF No. 1. Capital City has moved for summary judgment arguing that Vaughan has failed to exhaust administrative remedies by not obtaining a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission ("EEOC"), invalidating her Title VII claims. Def.'s Mot. Summ. J. & Req. Hr'g. ("Def.'s Mot.") at 1, 3, ECF No. 17. In opposition to the motion, Vaughan filed a memorandum stating that she has in fact obtained a right-to-sue notice, even though not required given the amount of time since filing her EEOC charge, and that other avenues for relief are still available regardless. Mem. Opp'n Mot. Summ. J. ("Pl.'s Opp'n") at 1, ECF No. 18. For the reasons stated below, Capital City's motion is denied.

II. FACTUAL BACKGROUND[1]

Capital City is a for-profit business that provides security services in the District of Columbia. Compl. ¶ 4. In April 2018, Vaughan was hired by Capital City to work as a D.C. Special Police Officer in the company's Shelter unit. *Id.* ¶ 5. In this chain of command, Vaughan reported to Lieutenant Herbert Griffin III, who in turn reported to Captain Eric Henry, who lastly reported to Inspector Andre Jackson. *Id.* In June 2018, about two months after Vaughan's initial hire, Vaughan sought transfer to the Housing unit as well as a shift change because she believed such changes would increase her hourly pay, lead to future promotions, and allow her to be home when her child returned from school. *Id.* ¶ 6. Vaughan notified Captain Ray Gordon, commander of the Housing unit, of both requests. *Id.*

Gordon informed Vaughan that Capital City "was granting her transfer request" and invited her to the company's Prince George's County headquarters in Maryland to sign the transfer and pay raise paperwork. *Id.* ¶ 7. When Vaughan first arrived at the headquarters right after her shift, Gordon told her to return later that evening because the paperwork was not ready. *Id.* When Vaughan returned, she found Gordon gathered with a group of officers, most of whom were drinking. *Id.* ¶ 8. Gordon and another officer invited Vaughan to have a drink to "celebrate her transfer." *Id.* Vaughan felt awkward but accepted, drinking only a small amount. *Id.* Gordon then asked Vaughan to come to his office to sign the paperwork. *Id.* ¶ 9. Gordon "closed the door, turned off the lights, undid his belt, walked up behind her, and started taking off her pants . . . . and . . . began sexually assaulting her." *Id.* ¶¶ 10–11. Gordon told Vaughan

[1] Because the factual record developed at this point in the litigation is sparse, the Court draws much of the following background from the allegations in the Complaint. The Court recounts the Complaint's allegations concerning the events at issue for background only; it does not accept them as true or undisputed.

that "he would make sure she got the 7 a.m. to 3 p.m. shift she had requested, and a promotion to Sergeant." *Id.* ¶ 11. Vaughan "had done nothing to suggest to Captain Gordon that she was interested in a sexual relationship," and "had not consented to his conduct in any way." *Id.* ¶ 10.

About a week later, Gordon told Vaughan to meet him at an auto-body shop he owned in Prince George's County. *Id.* ¶ 15. Vaughan alleges that Gordon again sexually assaulted her in the backseat of his vehicle. *Id.* ¶¶ 15–16. Vaughan "felt she had no choice but to submit to his unwelcome advances" and "feared that if she resisted, [Gordon] would take action that could cause her to lose her job." *Id.* ¶ 16.

After being twice sexually assaulted by Gordon, Vaughan experienced "persistent sexual harassment" from Gordon and his male colleagues over the next couple of months, including "[visits to] her work site" where they "leer[ed] at her in a sexual manner," texts with explicit images, and "suggest[ions] that she meet them at their homes." *Id.* ¶ 17. Vaughan was "disgusted" by these actions and felt "extremely vulnerable" and "scared of retaliation," but ultimately reported the sexual harassment to Capital City management in September 2018. *Id.* ¶¶ 19, 21. Capital City never followed up with Vaughan, did not fire Gordon, and did not take serious disciplinary actions against him or any of the other officers. *Id.* ¶¶ 24, 26.

Vaughan alleges that Capital City began a "retaliatory campaign" against her, first by denying the initial shift change and pay raise that she had been promised. *Id.* ¶ 28. Vaughan's counsel then sent a letter to Capital City in early October raising concerns about sexual harassment and retaliation. *Id.* ¶ 29. After that letter was sent, Capital City refused to assign Vaughan to a newly opened shift at her desired and formerly promised time. *Id.* ¶ 30. Additionally, Capital City initiated disciplinary proceedings against Vaughan for failing to notify her supervisor of her absence due to a family emergency, even though she had in fact notified her

supervisor and had attempted to confirm with him via his requested channels. *Id.* ¶¶ 31–33. Vaughan was placed on "indefinite suspension" despite her attempts to explain the situation, at which point her attorneys sent another letter to Capital City asserting claims of unlawful retaliation. *Id.* ¶¶ 35–36. Vaughan was asked to attend another disciplinary meeting, during which she was informed of other infractions she believed were unfounded. *Id.* ¶ 37. On October 31, 2018, Vaughan was reassigned without explanation to another location that was considered one of the "least desirable assignments," partly because of "frequent and serious criminal activity." *Id.* ¶ 39. At this point, Vaughan felt she was unable to carry out her duties under these conditions and informed the company of her decision to leave, to which they did not protest. *Id.* ¶ 40.

On November 7, 2018, Vaughan filed a charge of sex discrimination and retaliation with the EEOC. Pl.'s Opp'n at 2. Vaughan's charge remained pending before the EEOC for almost two years, and on October 8, 2020, Vaughan's counsel wrote to the EEOC requesting the issuance of a right-to-sue notice. *See Id.* Vaughan filed suit in this Court on October 13, 2020, five days after she requested a right-to-sue notice and about 700 days since she had filed her initial EEOC charge. *See* Compl.; Pl.'s Opp'n Ex. 2 at 3, ECF No. 18-3. The EEOC had not responded to the request for a right-to-sue notice by the time Vaughan filed suit in this Court. *See* Pl.'s Opp'n Ex. 2 at 1. On October 27, two weeks after Vaughan had filed suit, the EEOC responded saying that Vaughan could expect to receive her right-to-sue notice by Thanksgiving. *Id.* After some delay, the EEOC issued the Notice of Right to Sue on June 23, 2021. Pl.'s Opp'n Ex. 3 at 1, ECF No. 18-4.

Capital City filed a motion to dismiss or transfer venue on November 10, 2020, which this Court denied on April 22, 2021. *See* Def.'s Mot. Dismiss, ECF No. 4; Mem. Op. Den.

Def.'s Mot. Dismiss, ECF No. 10. Capital City filed its answer to the complaint about 100 days later on August 2, 2021. *See* Def.'s Answer at 8, ECF No. 14. Once discovery completed in March 2022, Capital City filed a motion for summary judgment in April, which the Court addresses here. *See* Def.'s Mot. In its motion, Capital City asserts the sole affirmative defense of failure to exhaust administrative remedies, claiming that Vaughan has not obtained a Notice of Right to Sue.[2] *Id.* at 3.

III. ANALYSIS

A. Legal Standards for a Motion for Summary Judgment and Failure to Exhaust

A court may grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material" fact is one capable of affecting the substantive outcome of the litigation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if there is enough evidence for a reasonable jury to return a verdict for the non-movant. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). The Court's inquiry is essentially "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

The principal purpose of summary judgment is to streamline litigation by disposing of factually unsupported claims or defenses and determining whether there is a genuine need for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The movant bears the initial

[2] By solely relying on the exhaustion defense, Capital City's motion only relates to Vaughan's Title VII claims. This Court does not address the availability or viability of Vaughan's other purported avenues for relief, the DCHRA or the Prince George's County Code. *See* Pl.'s Opp'n at 1.

burden of identifying portions of the record that demonstrate the absence of any genuine issue of material fact. *See* Fed. R. Civ. P. 56(c)(1); *Celotex*, 477 U.S. at 323. In response, the party opposing summary judgment must point to specific facts in the record that reveal a genuine issue that is suitable for trial. *See* Fed. R. Civ. P. 56(c)(1); *Celotex*, 477 U.S. at 324. In doing so, the nonmovant may not rely on "statements that are impermissible hearsay or that are not based on personal knowledge." *Shuler v. District of Columbia*, 744 F. Supp. 2d 320, 327 (D.D.C. 2010) (citation and quotations omitted). In considering a motion for summary judgment, a court must "eschew making credibility determinations or weighing the evidence," *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007), and all underlying facts and inferences must be analyzed in the light most favorable to the nonmovant, *see Anderson*, 477 U.S. at 255. Nevertheless, conclusory assertions offered without any evidentiary support do not establish a genuine issue for trial. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

Failure to exhaust administrative remedies is an affirmative defense. *See Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1058 n.3 (D.C. Cir. 1988) (MacKinnon, J., concurring) (citing *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985)). In raising exhaustion as an affirmative defense, the defendant "bears the burden of proving by a preponderance of the evidence that the plaintiff has failed to exhaust [its] administrative remedies." *Ndondji v. InterPark Inc.*, 768 F. Supp. 2d 263, 276 (D.D.C. 2011) (citing *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997)). This burden requires more than "[m]eager, conclusory allegations that the plaintiff failed to exhaust his administrative remedies." *Dobbs v. Roche*, 329 F. Supp. 2d 33, 38 (D.D.C. 2004).

B. Capital City Forfeited the Exhaustion Defense, but Vaughan Did Not Argue Forfeiture

Because Capital City did not include failure to exhaust administrative remedies as an affirmative defense in either its motion to dismiss or its answer, it forfeited the availability of the sole defense raised in its summary judgment motion. *See generally* Def.'s Mot. Dismiss; Def.'s

Answer. It is the law in the D.C. Circuit that an affirmative defense cannot be raised for the first time in a dispositive motion filed post-answer, but rather, must first be raised in a responsive pleading or in a pre-answer motion. *See Harris v. Sec'y, U.S. Dep't of Veterans Affs.*, 126 F.3d 339, 341 (D.C. Cir. 1997) (holding that an affirmative defense must be raised in a responsive pleading); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) (fine-tuning *Harris* to clarify that an affirmative defense may be raised by pre-answer motion, but not post-answer motion); *Nurriddin v. Goldin*, 382 F. Supp. 2d 79, 91 (D.D.C. 2005) ("Generally, an affirmative defense, such as failure to exhaust, must be raised in responsive pleadings."); *Jones v. Mukasey*, 565 F. Supp. 2d 68, 74 (D.D.C. 2008) ("[I]t is improper for defendant to raise [failure to exhaust administrative remedies] for the first time in his summary judgment motion."); *see also Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019) (resolving a split among the circuits by holding that Title VII's charge-filing instruction is not jurisdictional, and therefore may be forfeited if not "timely raised"). Because Capital City did not raise the exhaustion defense before filing a motion for summary judgment, the defense is unavailable.

A movant can only conceivably raise an affirmative defense in a summary judgment motion if also accompanied by a motion to amend the answer, which Capital City has not included here. In *Nurriddin v. Goldin*, the defendant raised the affirmative defense of exhaustion for the first time in its motion for summary judgment, but simultaneously moved for leave to amend its answer to include the exhaustion defense. 382 F. Supp. 2d at 90. The court granted the motion to amend, but also made clear that "[w]ithout this amendment, defendant could not assert the exhaustion arguments made in its motion for summary judgment." *Id.* at 91. Here, Capital City has not filed a motion to amend, so this Court cannot even consider granting summary judgment. If a movant attempts to raise affirmative defenses for the first time at the

summary judgment stage, "[i]t is clearly the motion to amend that is crucial." *Butler v. White*, 67 F. Supp. 3d 59, 67 (D.D.C. 2014). In *Butler*, Judge Lamberth even posed the exact scenario presented here: "If defendant had argued the affirmative defenses in its dispositive motion but never filed a motion to amend, *Harris* would certainly call for the forfeiture of defendant's affirmative defenses." *Id.* Such is the outcome here.

However, Vaughan's opposition to the motion for summary judgment does not raise the argument that Capital City has forfeited the exhaustion defense. *See generally* Pl.'s Opp'n. Therefore, Vaughan may well have forfeited the forfeiture argument—in other words, by not explicitly arguing that Capital City forfeited the exhaustion defense, Vaughan has in turn likely forfeited the possibility of asking the Court to deny the motion on those grounds. *See Lennon v. U.S. Theatre Corp.*, 920 F.2d 996, 1000 (D.C. Cir. 1990) (stating that a counter-plaintiff, by failing to point out the opposing party's omission of an affirmative defense, "in all likelihood waived any waiver defense" that may have been available); *cf. Solomon v. Vilsack*, 763 F.3d 1, 13 (D.C. Cir. 2014) (holding that defendant "forfeited his forfeiture argument" by failing to argue plaintiff's forfeiture before the district court, and therefore could no longer challenge the procedural preservation of plaintiff's claims). Accordingly, the Court explains below why Capital City's affirmative defense, even if not forfeited as a result of Vaughan's omission, nonetheless fails on its substance.

C. Vaughan Has Exhausted Administrative Remedies

Even assuming the exhaustion defense is available, the Court denies Capital City's motion because Vaughan *has* obtained a right-to-sue notice from the EEOC, which cures any potential defect. *See* Pl.'s Opp'n Ex. 3. In its motion, Capital City relies on *Giardino v. District of Columbia* for the notion that the receipt of a right-to-sue notice is a condition precedent to the

initiation of a Title VII action. *See* Def.'s Mot. at 3; 252 F.R.D. 18, 19 (D.D.C. 2008). However, *Giardino* also states that a plaintiff's Title VII action cannot be dismissed for failure to receive a right-to-sue letter once the notice is received. 252 F.R.D. at 20; *see also Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412, 1418 n.12 (D.C. Cir. 1983) ("[R]eceipt of a right-to-sue notice during the pendency of the Title VII action cures the defect caused by the failure to receive a right-to-sue notice before filing a Title VII claim in federal court."); *Holmes v. PHI Serv. Co.*, 437 F. Supp. 2d 110, 123 (D.D.C. 2006) ("[A] court should not dismiss [a Title VII] claim [for failure to exhaust administrative remedies] if, after filing the complaint but before dismissal, the plaintiff receives a corresponding right-to-sue letter from the EEOC."). In other words, Capital City's failure-to-exhaust defense is moot now that Vaughan has obtained a right-to-sue notice.

To be clear, the fact that Vaughan filed suit before receiving a right-to-sue notice is not necessarily a "defect" that needed to be cured—her action had been pending before the EEOC for well over Title VII's 180-day period, and other courts have held that expiration of this period entitles a plaintiff to sue regardless of whether they have received a letter. Title VII specifies that if the EEOC does not resolve a discrimination charge within 180 days, the EEOC "shall so notify the person aggrieved," *see* 42 U.S.C. § 2000e-5(f)(1), and another court in this district has construed this portion of the statute to stand for the proposition that a plaintiff is "free to come to Court once 180 days ha[s] elapsed from the filing of her administrative complaint." *Coleman-Adebayo v. Leavitt*, 326 F. Supp. 2d 132, 139 (D.D.C. 2004), *amended on other grounds*, 400 F. Supp. 2d 257, 262 (D.D.C. 2005); *cf. Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1093 (4th Cir. 1982) (holding that the receipt of a right-to-sue notice is unnecessary because "it is entitlement to a 'right to sue' notice, rather than its actual issuance or receipt, which is a

prerequisite"); *Hill v. Washington Metro. Area Transit Auth.*, 231 F. Supp. 2d 286, 293 n.4 (D.D.C. 2002) (remarking that it would be "implausible" for the EEOC to have the ability to prevent a Title VII complainant from seeking judicial relief by refusing to issue a right to sue notice (quoting *Perdue*, 690 F.2d at 1093 n.5)). Here, it does not appear that the EEOC notified Vaughan of the status of her claim once the 180-day mark passed, but instead, only contacted her after her counsel requested a right-to-sue notice in October 2020. When Vaughan filed suit in this Court, her charge had been pending before the EEOC for about 700 days. Therefore, under these cases, Vaughan was free to come to this Court as early as May 2019, which was 180 days from her EEOC filing in November 2018, and so was clearly permitted to bring suit in October 2020.

Capital City's motion for summary judgment is denied. The exhaustion defense was raised too late, though the Court is hesitant to deny Capital City's motion on those grounds given that Vaughan failed to raise this point in opposition. But even if the exhaustion defense were available as a result of Vaughan's omission, Vaughan covered her bases by obtaining a right-to-sue notice, and in any event, by suing once her claim had been pending with the EEOC for over 180 days—a procedural posture which other courts have held entitles a plaintiff to sue, even without a right-to-sue letter.

IV. CONCLUSION

For the foregoing reasons, Capital City's motion for summary judgment (ECF No. 17) is **DENIED**. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: 06/27/2022

RUDOLPH CONTRERAS
United States District Judge

Applicant Details

First Name	**Gabriel**
Middle Initial	**E**
Last Name	**Shoemaker**
Citizenship Status	**U. S. Citizen**
Email Address	**ges8067@nyu.edu**
Address	**Address** Street **3417 37th Street Apt 6** City **Long Island City** State/Territory **New York** Zip **11101** Country **United States**
Contact Phone Number	**5734504408**

Applicant Education

BA/BS From	**Saint Louis University**
Date of BA/BS	**May 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of International Law & Politics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

McCain, Caleb
Caleb.McCain@tn.gov
Siffert, David
siffert@nyu.edu
Friedman, Barry
barry.friedman@nyu.edu
212-998-6293

This applicant has certified that all data entered in this profile and any application documents are true and correct.

GABRIEL SHOEMAKER
573-450-4408 • GES8067@NYU.EDU

Gabriel Shoemaker
3417 37 Street, Apt. 6
Astoria, New York NY 11101

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

My name is Gabriel Shoemaker, and I am a rising 3L at New York University School of Law. I am writing to apply as a clerk in the 2024-2025 term in your chambers. Please find enclosed my resume, my unofficial law school transcript, my undergraduate transcript, my writing samples, and my letters of recommendation.

My writing samples consist of a supplemental brief written in support of a criminal defendant's motion to dismiss and an online annotation which discusses international arbitration in Ancient Greece. The brief was prepared at the instruction of Assistant Public Defender Caleb McCain, is public record, and has been utilized as a writing sample with his permission. The annotation was prepared for the NYU Journal of International Law and Politics' Online Forum. Professor Barry Friedman, Assistant Public Defender Caleb McCain, and Professor David Siffert provided my letters of recommendation. Barry Friedman is a professor at New York University School of Law. I worked closely with Professor Friedman as a research assistant in the 2022-2023 academic year, and in the coming academic year, I will work as his teaching assistant. Professor Friedman can be reached at 212-998-6293 or at barry.friedman@nyu.edu. Caleb McCain is an Assistant Public Defender with the State of Tennessee District Public Defender's Office. I worked with Mr. McCain during my 2022 summer internship. Mr. McCain can be reached at 615-631-8084 or at caleb.mccain@tn.gov. David Siffert is the Director of Research and Projects at the Center on Civil Justice and a professor at New York University School of Law. I worked with Professor Siffert as a research assistant with the Center on Civil Justice in the summer of 2022. Professor Siffert can be reached at 212-998-6664 or at das532@nyu.edu.

After graduation I intend to pursue a career in litigation. My time at NYU has fostered not just a passion for litigation, but also a passion to serve the public. I intend to clerk not only to grow my skills as a litigator, but also to actively serve and give back to the legal field.

Respectfully,

Gabriel Shoemaker

GABRIEL SHOEMAKER
(573) 450-4408
ges8067@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.75
Honors: *Robert McKay Scholar* (Top 25% of the class after four semesters)
Dean's Scholarship - *partial tuition scholarship based in part upon academic merit*
Journal of International Law and Politics (JILP), Senior Online Editor
Activities: United Nations Diplomacy Clinic, Incoming Clinic Student, Fall 2023
Professor Barry Friedman, Incoming Teaching Assistant, Fall 2023-Spring 2024
Government Civil Litigation Clinic, EDNY, Extern, Spring 2023
Professor Barry Friedman, Research Assistant, Fall 2022-Spring 2023
American Constitution Society, Policy & Elections Co-Chair, Fall 2022-Spring 2023
International Refugee Assistance Project, Working Group Co-Chair, Fall 2022-Spring 2023
Center on Civil Justice, Research Assistant, Summer 2022

SAINT LOUIS UNIVERSITY, St. Louis, MO
B.A. in Russian Studies and History, *summa cum laude,* May 2020
Cumulative GPA: 3.94
Honors Capstone: *The Ozarks: History, Misunderstanding and Modern Politics*
Honors: Investigative Learning Experience (ILEX) Grant Recipient
Dobro Slovo, National Slavic Honors Society Member
Activities: Model United Nations, Undersecretary of Communication, Fall 2017
Lewis Place, Volunteer Student Tutor, Fall 2016-Fall 2017

EXPERIENCE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, NY
Summer Associate, Summer 2023

STATE OF TENNESSEE DIST. PUBLIC DEFENDER, 16TH JUDICIAL DISTRICT, Murfreesboro, TN
Summer Intern, May 2022-August 2022
Worked closely with staff attorneys to defend indigent clients. Conducted first sitting interviews with defendants in General Sessions Court and explained plea deals and other legal options. Assisted in negotiations with district attorneys to secure favorable plea deals for clients. Researched and submitted a supplemental brief through counsel in support of a Ferguson Motion to dismiss an indictment and sat second chair at the motion hearing.

SAINT LOUIS PUBLIC SCHOOLS, St. Louis, MO
Long-Term Music Substitute Teacher, March 2021-June 2021
Led elementary music classes ranging from Pre-K to 5th grade. Drafted lesson plans, evaluated students, and completed objectives for in-person classes. Coordinated a 5th grade graduation musical performance. Assisted arts faculty in managing their classrooms and ensuring a welcoming learning environment.

COLORADO DEMOCRATIC PARTY, Aurora, CO
Field Organizer, August 2020-November 2020
Managed 111 volunteers engaging in direct voter contact. Served as Virtual Staging Location Director, reporting key voter turnout metrics every two hours and ensuring that Get Out the Vote (GOTV) events ran smoothly.

BULRUSH RESTAURANT, St. Louis, MO
Research Intern, August 2019-March 2020
Collaborated with Chef Rob Connoley, PhD, to collect and research primary source culinary documents from the 19th-century Ozarks. Awarded ILEX Grant to facilitate travel to two university archive sites to complete Honors Capstone which was featured in the Senior Legacy Symposium.

ADDITIONAL INFORMATION

Intermediate proficiency in Russian language. Enjoy piano, board games, and cartography.

Name: **Gabriel E Shoemaker**
Print Date: **06/10/2023**
Student ID: **N10336485**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Rachel E Barkow			
Torts	LAW-LW 11275	4.0	A-
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Samuel Issacharoff			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: James F Gilligan, David A J Richards, Maegan F Ciolino			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Juan P Caballero			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Emma M Kaufman			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Liam B Murphy			
Criminal Procedure: Police Practices	LAW-LW 12697	4.0	A+
Instructor: Barry E Friedman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Legal History Colloquium	LAW-LW 11160	2.0	A-
Instructor: David M Golove, Daniel Hulsebosch, Noah Rosenblum			
International Law	LAW-LW 11218	3.0	A-
Instructor: Mattias Kumm			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Stephen Gillers			
Constitutional Law	LAW-LW 11702	4.0	A
Instructor: David A J Richards			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Government Civil Litigation Externship - Eastern District	LAW-LW 10253	3.0	CR
Instructor: Dara A. Olds			
Government Civil Litigation Externship - Eastern District Seminar	LAW-LW 10554	2.0	A
Instructor: Dara A. Olds			
Corporations	LAW-LW 10644	5.0	A
Instructor: Marcel Kahan			
Judicial Decision Making	LAW-LW 12250	4.0	A
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Journal of International Law & Politics 2022-2023

End of School of Law Record

DISTRICT PUBLIC DEFENDER

16TH JUDICIAL DISTRICT – CANNON AND RUTHERFORD COUNTIES

GERALD L. MELTON

DISTRICT PUBLIC DEFENDER

JEFFREY S. BURTON
J.D. DRIVER
BILLIE ZIMMERMANN
KENNETH R. MCKNIGHT
SEAN G. WILLIAMS
LESLIE MCBRIDE
ISAAC CALLISON
BRITTANY HOLLIS
BEN WETSELL
CASEY LITTLE
SUMMER BRASHEARS
CALEB B. MCCAIN
KATIE LADEFOGED
Assistant Public Defenders

RONALD MEYER
BILL SHARP
Investigators

ELROD BUILDING
118 NORTH CHURCH STREET
MURFREESBORO, TN 37130

TELEPHONE: (615) 898-8020
FAX: (615) 898-8061

APRIL ODOM
Office Manager/Paralegal

BETHE BECKER
GINA GAMMON
Legal Secretaries

April 21, 2023

Re: Gabriel Shoemaker – Letter of Recommendation

Dear Judge:

It is with pleasure that I provide this letter of recommendation for Mr. Gabriel Shoemaker.

Mr. Shoemaker interned with our office during the summer of 2022. During his time here he worked one-on-one with numerous attorneys in our office, with our clients, and with several of the assistant district attorneys. Without exception all who interacted with Mr. Shoemaker commented on his intelligence, his excellent professional demeanor, and his uncanny ability to be a self-starter and get work done. Indeed, Mr. Shoemaker conducted himself with ability exceeding that of many seasoned lawyers I know. He did all this with confidence, yet without cockiness.

Mr. Shoemaker also worked closely with me on a particularly thorny vehicular homicide case. I had filed a placeholder motion to dismiss the case on an issue of lost or destroyed evidence. Mr. Shoemaker came behind and wrote the substantive supplemental brief in support of our motion. The brief was perfectly balanced. Mr. Shoemaker had researched the law on the issues down to the bottom. He distilled the essence of the law with precision and applied it appropriately to the facts. When I read his brief I learned, through his clear writing and analysis, exactly where the strengths and weaknesses our argument lay. With his help we conducted an all-day hearing on the motion, and it was his cogent analysis that gave me confidence during the cross examination of the officers – I knew I was getting at the heart of the legal issues before the court.

Without reservation I wholeheartedly recommend Mr. Shoemaker for a judicial clerkship, and I would be happy to discuss his contributions further via telephone or email. Thank you for your attention to this matter.

Sincerely,

Caleb McCain, APD

mobile: 615.631.8084
caleb.mccain@tn.gov

CENTER ON CIVIL JUSTICE
at NYU School of Law

DAVID A. SIFFERT
Adjunct Professor of Clinical Law
Director of Research and Projects

NYU School of Law
139 MacDougal Street, 511
New York, NY 10012
P: 212 998 6664
das532@nyu.edu

May 8, 2023

RE: Gabriel E. Shoemaker, NYU Law '24

Your Honor:

I am writing enthusiastically to recommend Gabe Shoemaker to serve as a clerk in your chambers. I have supervised dozens of Research Assistants over almost seven years as the Research Coordinator and then Director of Research & Projects at the Center on Civil Justice at NYU Law. Among all these interns, Gabe was among the very best. I am confident you will be equally pleased to have Gabe work for you as a law clerk.

As Gabe's direct supervisor at the Center on Civil Justice, I had the privilege of working closely with him on several projects. He took on each with a level of enthusiasm and dedication that is hard to come by among students who also have extensive coursework commitments.

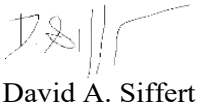
Gabe helped author a forthcoming paper on the subject of conflicts of interest in third-party litigation funding, providing assistance with research, writing, and citing. Among CCJ's focus areas has been third-party funding. It has grown to be a fact-of-life in the litigation industry, and CCJ is working to ensure that it is integrated in a way that is transparent and free of the biggest risks. In this paper, we are examining niche examples where a third-party funding could have an outside interest in a funded lawsuit. From Peter Thiel funding Hulk Hogan's lawsuit against Gawker to a short-seller funding a *qui tam* action against the shorted company, outside interests of funders are edge cases worth grappling with. Gabe took a lead role in helping flesh out this paper, working with me and others to take it from an outline to a draft. Gabe's excellent work was indispensable in creating the paper.

Gabe also took the lead in keeping the Center's Dispute Financing Library up-to-date. CCJ hosts the largest publicly and freely available database of documents on the subject of third-party dispute funding. It contains statutes, case law, journal articles, bar reports, news stories, legislative history, and more. Each document is manually tagged and uploaded by CCJ research assistants. During the Sumer of 2022, Gabe was responsible for keeping the library up-to-date with these documents as they came out. He did an excellent job. He was responsible and reliable, and his work tagging the documents was detailed and accurate.

Gabe distinguished himself as a Research Assistant with his enthusiasm and work ethic. His excitement for even technical material such as third-party litigation funding made working with him a pleasure. He was quick to do deep dives into material and genuinely loves to learn and put his knowledge to use. He is an excellent writer, a strong researcher, and a

sharp legal mind. He will make a strong, dedicated, and above-all enthusiastic law clerk. I unhesitatingly recommend that you hire him.

Sincerely,



David A. Siffert

Barry Friedman
Jacob D. Fuchsberg Professor of Law
Affiliated Professor of Politics
Director, Policing Project

40 Washington Square South, Rm. 317
New York, New York 10012-1099
Tel: (212) 998-6293
Fax: (212) 995-4030
barry.friedman@nyu.edu

Dear Judge,

I am writing on behalf of Gabriel (Gabe) Shoemaker, who is applying to clerk for you beginning at any point after he graduates in the Spring of 2024. Gabe has been my student in two classes, and my research assistant. He's a really strong candidate for a clerkship; I think extremely highly of him. I hope you will consider his application seriously.

I met Gabe as a student in my 1L Criminal Procedure elective. He received the highest grade in the class, and I can tell you his exam was far beyond most of the class. His participation in class matched that grade. Gabe is neither flashy nor showy, and he was not a gunner, but he was a simply fantastic participant, always prepared, always thoughtful.

In his second year, Gabe took my course on Judicial Decision-making, which brings social science to bear on questions of judging and legal institutions. The course asks a lot of students. Gabe did extremely well in the class, getting a grade of A. But even more so in this class, Gabe's participation said a great deal about who he is. The class was full of participators, and again Gabe was no gunner. What I did notice is often when everyone was stumped, Gabe had his hand up and moved us long with a thoughtful answer, a clever insight, or just knowing the material inside out.

In between, Gabe was my research assistant. He worked on a number of projects, but mostly on a piece about the impact of changing gun laws on policing and the law of Criminal Procedure. I've hired a bevy of research assistants in this period, but Gabe has been a standout. He is fastidious and his work was incredibly strong. It is not that Gabe always would get things perfect—like all rising 2Ls, Gabe was learning. It is that Gabe either got it right or knew to ask the right question, and so I almost never had to correct anything.

Gabe is going to be a dream clerk. He writes extremely clearly. Again, nothing flashy, but extremely direct and easy to follow and persuasive when that is what is called for. His writing reflects his brain power, which I have found consistently in many settings to be first rate. He's also just a really decent person. I enjoy talking with him, he is always available to help. At times when I have not called on him, he will right to remind me he is available should I need. He's just a real professional, and an adult. He's done a fair amount of real world things – from political campaigns to teaching—and it shows in his maturity.

Gabe is destined first for firm life, and then he hopes to government, perhaps as a prosecutor or in the state department – he has some background in international relations. Gabe is from a small town in St. Louis, and sometimes I'm not sure he is aware just how far he could go in this world, and I very much hope he clerks for a judge who will be a superb mentor to him. He's worth it and he deserves it.

As you can tell, I'm a big fan of Gabe's. I'd hire him for anything. I hope you will interview him; I suspect upon meeting him you will want to hire him yourself.

I'd be happy to answer any questions.

Best regards,

Barry Friedman

WRITING SAMPLE OF GABRIEL SHOEMAKER

NEW YORK UNIVERSITY SCHOOL OF LAW

J.D. CLASS OF 2024

As a 2022 summer intern at the State of Tennessee District Public Defender, 16th Judicial District, I prepared a supplemental brief in support of a Ferguson Motion to dismiss an indictment due to the State's failure to preserve potentially exculpatory evidence. Specifically, the brief argues that the State failed in its duty to preserve a blood sample when a blood test was the only extant evidence of impairment in a vehicular homicide case.

Although the brief was edited by my supervising attorney, Caleb McCain, it is substantially my own work. I have received express permission from my employer to use this brief as a writing sample. As the brief was publicly filed through counsel, no portions have been redacted.

Statement of the Issues

Two legal issues are before the court: Whether the state has a duty to preserve a blood sample in the case of a vehicular homicide under the *State v. Ferguson,* 2 S.W.3d 912, 917 (Tenn. 1999) and *State v. Merriman,* 410 S.W.3d 779, 785 (Tenn. 2013) standards for preserving exculpatory evidence, when the blood sample is the sole piece of evidence supporting the allegation of operating a vehicle while impaired; and whether, in failing to preserve the blood sample in the present case, Mr. Hargrove's right to a fair trial was violated, and that therefore the indictment should be dismissed.

Preliminary Statement

The state has failed in its duty to preserve the blood taken from the Defendant, Mr. Hargrove, following the car accident which took place on August 2, 2018. At the time of his accident, Mr. Hargrove lacked any visible signs of impairment. State Trooper Simunic and Sergeant Andrew Naylor allowed Mr. Hargrove to walk out of the hospital on the day of the accident. The blood, and the subsequent TBI forensic report showing alleged methamphetamine and amphetamine present in Mr. Hargrove's blood, are the only evidence in the case to demonstrate that Mr. Hargrove was operating a vehicle while impaired. As such, the blood sample in question has an overwhelming probative and exculpatory value. Moreover, there are serious doubts as to the accuracy of the blood forensic analysis in question, doubts which are now impossible to assuage without the now-destroyed blood sample. Without this blood, the trial as conducted would be rendered fundamentally unfair, and pursuant to *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999) and *State v. Merriman*, 410 S.W.3d 779 (Tenn. 2012), the defense humbly prays that the court will grant the motion to dismiss.

Statement of the Facts

The state has charged Mr. Hargrove with vehicular homicide by intoxication and vehicular assault for a crash that occurred on August 2, 2018. Mrs. Janice Singleton died from injuries received in the crash. Mr. Randall Singleton was also injured in the crash.

EMS transported Mr. Hargrove to the hospital after the crash. However, Mr. Hargrove lacked any serious injuries. State Trooper Simunic interviewed Mr. Hargrove at the hospital, and upon the request of the District Attorney's Office, Sergeant Andrew Naylor of the Department of Homeland Security Special Investigations Bureau also interviewed Mr. Hargrove at the hospital. While at the hospital, Mr. Hargrove's blood was drawn for forensic toxicology. Ultimately, lacking any indication that Mr. Hargrove was intoxicated, despite Mr. Hargrove's admission that he had consumed methamphetamine and marijuana the previous day, State Trooper Simunic and Sergeant Naylor allowed Mr. Hargrove to leave the hospital. Officers did not place Mr. Hargrove under arrest on August 2, 2018.

TBI issued a forensic toxicology report for Mr. Hargrove's blood on October 6, 2018. Said report showed the alleged methamphetamine and amphetamine in Mr. Hargrove's blood. The report also stated that the blood sample would be destroyed on July 1, 2019, which it subsequently was. On August 1, 2019, Trooper Simunic took out an arrest warrant against Mr. Hargrove for the charges in this case. The warrant was taken out nearly one year to the day after the crash and was issued, nine months and sixteen days after the forensic report was issued, and after the blood, the only evidence in the case against Mr. Hargrove, was destroyed. The state served Mr. Hargrove with the warrant on January 20, 2020. The entire time that the warrant went unserved, Mr. Hargrove was in TDOC custody in Bledsoe County.

Argument

This case presents the issue of whether the state had a duty to preserve Mr. Hargrove's blood, and whether in failing in that duty the court should now dismiss the present indictment because the defendant's trial would be rendered fundamentally unfair. The factual record and case law present two conclusions: Pursuant to Tenn. R. Crim. P. 16, *State v. Ferguson,* 2 S.W.3d at 917 and *Brady v. Maryland*, 373 U.S. 83, 86-87 (1965), the state had a duty to preserve the defendant's blood. In failing to preserve this blood, and after an examination of the *State v. Merriman,* factors used to determine the proper remedy for that failure, the court should dismiss the indictment for violating Mr. Hargrove's right to a fair trial. 410 S.W.3d at 785.

I. The State Had a Duty to Preserve Defendant's Blood

The introductory question of whether an indictment should be dismissed based on a failure to preserve exculpatory evidence is whether the state had a duty to preserve that evidence. *Ferguson,* 2 S.W.2d at 917. The state has a duty to preserve "evidence that might be expected to play a significant role in the suspect's defense." *Merriman,* 410 S.W.3d at 785 (quoting *Ferguson,* 2 S.W.2d at 917). Such "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 488-489 (1984). Such evidence can also be that which is covered under Tenn. R. Crim. P. 16. *See Ferguson,* 2 S.W.2d at 917.

Mr. Hargrove's blood would certainly be expected to play a serious role in this case. Prior to the return of the forensic toxicology report from TBI, the state had not seen it fit to charge Mr. Hargrove with any crime related to the accident. It appears that the state's entire case rests on the blood test in question. Both Sergeant Naylor and State Trooper Simunic allowed Mr. Hargrove to walk out of the hospital, indicating that they believed that he was not operating the

vehicle while impaired, even after Mr. Hargrove's own admission that he had consumed methamphetamine and marijuana the day prior to the accident. Also problematically, after examining the timeline surrounding the administration of the blood test and the blood sample's destruction, it also appears that the state may have violated Tennessee law in destroying the blood without giving Mr. Hargrove the opportunity to request an independent sample. Under TENN. CODE. ANN. § 55-10-408(e), the "person tested shall be entitled to have an additional sample of blood or urine procured and the resulting test performed by any medical laboratory of that person's own choosing and at that person's own expense." In *State v. McKinney*, the Court of Criminal Appeals held that an officer is not required to inform a suspect of their right to obtain another sample of their blood for further testing. 605 S.W.2d 842, 846 (Tenn. Crim. App. 1980). The defense does not contest this. What is concerning here is that the sample was destroyed a month prior to the commencement of criminal proceedings against Mr. Hargrove. He had no reason to know that he should have requested further testing. Additional testing was not even an option by the time that the indictment was filed as the blood test had already been destroyed.

a. This Case is Distinguishable from Other Precedent on Preserving Blood

There is a cornucopia of case law about blood taken to determine a defendant's BAC or otherwise determine the presence of narcotics in a defendant's blood. Much of this case law would seem to suggest that there is no duty to preserve blood. *See, e.g.*, *State v. Jordan*, 325 S.W.2d 1, 82-83 (Tenn. 2010); *State v. Riddle*, No. E2014-01037-CCA-R3-CD, 2015 WL 9487936 at *12 (Tenn. Crim. App. Dec. 29, 2015); *State v. Leath*, 461 S.W.2d 73, 98 (Tenn. Crim. App. 2013); *State v. Bridges*, No. E2019-01003-CCA-R3-CD, 2021 WL 928476 at * 7 (Tenn. Crim. App. Mar. 11. 2021); *State v. Blair*, No. M2015-01231-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 863 at *24 (Tenn. Crim. App. Nov. 16, 2016); *State v. Gilbert*, 751 S.W.2d 454, 461 (Tenn. Crim. App. 1988); *State v. Moffitt*, No. W2009-02286-CCA-R3-CD, 2010 Tenn.

Crim. App. LEXIS 1052 at *5 (Tenn. Crim. App. Dec. 15, 2010); *State v. Bullington*, No. M2005-02227-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 495 at *4-5 (Tenn. Crim. App. June 27, 2006). In each of these cases, a blood sample was destroyed after testing was completed and the subsequent motion to either dismiss the indictment or otherwise suppress the evidence from the still extant test results was defeated on the grounds that the state had no duty to preserve the blood sample. The state will point to these cases to defeat this motion at its initial step, but the present case is distinguishable from the above cases in several important respects and presents a novel fact pattern for the court to consider.

Generally, in the above cases, the blood test results were not the sole piece of evidence pointing to a level of intoxication. In *Riddle*, following a vehicular homicide, one of the officers testified that he could smell alcohol on the defendant's breath and the defendant had made incriminating statements regarding her consumption of alcohol earlier that day to the officer. 2015 WL 9487936 at *2, *5. In *Bridges,* an officer stated that the defendant smelled of alcohol. 2021 WL 928476 at *1. In *Blair,* the defendant's impairment was spoken to not just by a private citizen's 911 call, but also by the observations of police officers, who witnessed erratic and dangerous driving, as well as the defendant's swaying motions. 2016 Tenn. Crim. App. LEXIS 863 at *2. In *Gilbert*, both a private citizen and an officer were able to verify behavior indicating intoxication, with the defendant driving erratically and performing poorly on a field sobriety test. 751 S.W.2d at 457-458. In *Moffitt* there was video evidence showing both the defendant's erratic driving as well as his poor performance on a field sobriety test. 2010 Tenn. Crim. App. LEXIS 1052 at *1. Finally, in *Bullington*, the arresting officer noticed an odor of alcohol around the defendant. 2006 Tenn. Crim. App. LEXIS 495 at *1. In each of these cases, there was corroborating evidence pointing to the impairment of the defendant which existed independently

of the destroyed blood samples. Often, this evidence was substantial, either in the form of video recordings, or in the form of a private citizen's corroboration, in addition to officer testimony to the defendant's behavior or actions indicating intoxication. None of these factors exist in Mr. Hargrove's case. Neither officer that was involved in interviewing Mr. Hargrove at the hospital has given any indication that he was impaired in any way. Nor is there any other corroboration as to the allegation of the defendant's intoxication at the time of the accident aside from his own statement to the officers that he had used narcotics the day before. Mr. Hargrove was allowed to walk out of the hospital on the day of the accident. Consequently, the blood sample and the subsequent test results are the foundation on which this case lies.

Moreover, in the above cases, there was often very little reason to challenge the veracity of the test results. In *Jordan,* the "defendant…failed to offer any evidence that the test results reported…[did] not accurately reflect the contents of his blood and urine" and that therefore because there was "no indication that additional testing of the defendant's blood and urine would have yielded results different from those found by the TBI, it cannot be said that evidence critical to the defense was excluded." 325 S.W.2d at 83. In *Riddle*, the defendant did not adequately challenge the results of the blood test. 2015 WL 9487936 at *11. In *Leath,* when blood and urine samples of the victim were destroyed, the defendant failed to challenge the accuracy of the test results, thereby not showing that exculpatory evidence was excluded. 461 S.W.3d at 98. The defense in the present case has strong reason to challenge the accuracy of the test results. With a day having passed since Mr. Hargrove's last ingestion of methamphetamine, according to Mr. Hargrove's own statement, there is reason to doubt the level of methamphetamine and amphetamine that would have appeared in his blood. According to The Recovery Village, methamphetamine can remain in a user's blood for as little as one day, casting some doubt as to

the methamphetamine levels presented by the blood test. Erica Weiman, *How Long Does Meth Stay in Your System*, (May 1, 2022) https://www.therecoveryvillage.com/meth-addiction/how-long-meth-stay-system/. Because at the hospital Mr. Hargrove was not showing any other sign of intoxication, there is additional reason to doubt the veracity of the test.

The state had a duty to preserve the blood in the present case. Mr. Hargrove's blood would reasonably be expected to play a significant part in his defense. Prior to the TBI report indicating the presence of methamphetamine and amphetamine in defendant's blood, no indictment had been filed against Mr. Hargrove, showing that even the state recognized the probative value of the blood sample evidence. Beyond this, the present case is distinguishable from past case law on the subject. There is no other corroborating evidence of Mr. Hargrove's alleged intoxication. Additionally, there is reason to challenge the veracity of the blood results. The state's duty to preserve Mr. Hargrove's blood is clear.

II. Due to the State's Failure to Preserve Defendant's Blood, the Court Should Dismiss the Indictment

As a result of failing to preserve potentially exculpatory evidence, *Merriman* directs the court to balance three factors in crafting sufficient relief. 410 S.W.3d at 785 (citing *Ferguson*, 2 S.W.2d at 917). These factors are:

> (1) [t]he degree of negligence involved;
>
> (2) [t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
>
> (3) [t]he sufficiency of the other evidence used at trial to support the conviction.

If after balancing these factors the trial court determines that the trial would be fundamentally unfair without the missing evidence, the court may dismiss the charges. *Id.* at

785-786. After balancing these factors, this court should find that the trial would be fundamentally unfair and dismiss the indictment against Mr. Hargrove.

a. Significant Negligence was Involved in the Destruction of the Blood Sample

The first *Merriman* factor to consider is the negligence involved in the destruction of evidence. 410 S.W.3d at 785 (citing *Ferguson*, 2 S.W.2d at 917). Negligence is presumed when potentially exculpatory evidence is destroyed, and this presumption must be overcome by the state. *Ferguson,* 2 S.W.2d at 917 n. 10. Potentially exculpatory evidence was destroyed. However, the analysis does not end there. Tennessee courts have also considered the degree of negligence involved, namely whether the conduct resulting in the destruction of the evidence amounts to simple/general or gross negligence. *See Merriman*, 410 S.W.3d at 793; *see also Ferguson*, 2 S.W.3d at 918. In *Ferguson*, the court distinguished between simple and gross negligence by asking whether bad faith was involved on the part of the state in the destruction of the evidence. 2 S.W.3d at 918. In *Merriman*, the court further expounded on this standard, noting in its finding of simple negligence following the destruction of relevant video evidence by a police department, that no department procedures were violated. 410 S.W.3d at 793. It appears that the blood was destroyed within the standard operating procedures of the TBI. The TBI Evidence Rules state that evidence must be preserved in the lab for at least sixty days, and only then can it be destroyed, although it could be preserved following a court order. Mark R. Gwyn, *Tennessee Bureau of Investigation Evidence Guide* 64 (Sept. 2015). Moreover, a notice was printed on the bottom of the test results in this case indicating when the blood sample would be destroyed. TBI's behavior does not indicate the sort of bad faith or failure to follow protocols that would give rise to gross negligence. Nevertheless, the behavior on the part of the state, either from law enforcement or the District Attorney's Office, contains the hallmarks of negligence. At the time that the blood was destroyed, the state had reason to know the blood's probative and

exculpatory value. The state had in its possession the reports from State Trooper Simunic and Sergeant Naylor indicating that Mr. Hargrove was not demonstrating any other signs of intoxication other than his admission of having consumed methamphetamine and marijuana the day before, and the state declined to charge Mr. Hargrove until the results of the blood test were available. The state either did know or should have known the value of the blood test prior to its destruction and should have known to request its preservation. And while the state's conduct may not rise to a level of gross negligence, there was significant negligence involved in their decision to not preserve the blood sample. In sum, the state has not met its burden in overcoming the presumption of negligence.

b. The Destroyed Evidence Possesses Significant Probative Value

The second *Merriman* factor to consider is the "significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available." *Merriman,* 410 S.W.3d at 785 (citing *Ferguson*, 2 S.W.2d at 917). The record in the present case speaks to the probative value of the blood and the blood test. The blood and the test results appear to be the sole pieces of evidence indicating intoxication at the time of the accident. Mr. Hargrove's statement to his previous narcotic use is not determinative or even probative as to his physical or mental state at the time of the accident and does not discount the probative effects that a present blood sample would possess. Effects from the consumption of methamphetamine can last approximately eight to twenty-four hours, depending on several factors. *See* Ryan Kelley, *How Long Does Meth Stay in Your System*, (Apr. 26, 2022), https://americanaddictioncenters.org/meth-treatment/how-long-in-system. By the time the accident occurred, Mr. Hargrove may no longer have been experiencing the effects of methamphetamine usage from the day before. This occurrence is consistent with the record of State Trooper Simunic and Sergeant Naylor's meeting with Mr. Hargrove, which indicated no

outward signs of narcotic influence. Because of this, Mr. Hargrove's statements that he had ingested methamphetamine should not be considered as secondary evidence probative of his intoxication. This, coupled with Mr. Hargrove's behavior lacking any indication of intoxication at the hospital, leaves the blood and the blood test as the *only* probative evidence in this case.

Moreover, there are doubts as to the veracity of the blood tests, derived from the time which had elapsed between Mr. Hargrove's last methamphetamine usage and the accident, as well as the statements of the officers who interviewed Mr. Hargrove, and their actions in allowing Mr. Hargrove to leave the hospital. All these cast doubts on the accuracy of the blood test results indicating intoxication. This clearly diminishes the value which the blood test result possesses to the court and leaves the blood as the only evidence of probative value. Without the physical blood, and the retesting it would allow, there can be no verification of the blood test results. Without the physical blood, and the ability to retest it, Mr. Hargrove's right to a fair trial has been violated.

c. There is No Other Evidence Which can be Used to Support Conviction

The final *Merriman* factor for the court to consider when crafting a remedy is the "sufficiency of the other evidence used at trial to support the conviction." *Merriman,* 410 S.W.3d at 785 (citing *Ferguson*, 2 S.W.2d at 917). In *Ferguson,* there was other corroborating evidence which existed to support the defendant's conviction. 2 S.W.2d at 918. In that DWI case, despite the unavailability of possibly probative video evidence, officer testimony regarding the defendant's behavior, and a failed sobriety test were present to provide additional evidence to support convictions. *Id.* Here, there is no other evidence aside from the blood and the blood test which would be sufficient to support conviction. Because of the doubts which exist regarding the veracity of the blood test, the test itself is also not sufficient to support conviction in the present case. Once again, the testimony of the officers' who spoke with Mr. Hargrove at the

hospital indicates no evidence of intoxication at the time of the accident. Mr. Hargrove's admission to the officers of his use of methamphetamine and marijuana the previous day is also not dispositive of the question of his alleged intoxication at the time of the accident. The only probable cause mentioned in the arrest warrant relates to the blood test. Without this, there is no evidence before the court that could support conviction.

Conclusion

The fundamental question before the court is whether by destroying the blood sample, Mr. Hargrove's right to a fair trial has been violated. It has been. The blood and the blood test derived therefrom were the only pieces of evidence present to support the probable cause of Mr. Hargrove's indictment of vehicular homicide and vehicular assault. Without the blood and the blood test, there is no evidence to demonstrate Mr. Hargrove's intoxication, even when considering Mr. Hargrove's own statements that he had consumed methamphetamine and marijuana the day prior to the accident. And while the state will point to Tennessee state court precedent indicating that the state did not have a duty to preserve Mr. Hargrove's blood, this case presents a new factual pattern for the court to consider: one where there is both no corroborating evidence of Mr. Hargrove's intoxication and where there are doubts as to the veracity of the extant test results. Because of this, this case is clearly distinguishable from previous case law on the state's lack of duty to preserve blood, and the state did have a duty to preserve the blood, which it failed to do. Because of this failure to preserve, and after balancing the *Merriman* factors for determining a remedy for this failure, we humbly pray that the court dismisses the indictments against Mr. Hargrove.

WRITING SAMPLE OF GABRIEL SHOEMAKER

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As a staff editor at the New York University Journal of International Law & Politics during the 2022-2023 academic year, I researched and drafted an online annotation which discusses the practice of international arbitration in Ancient Greece. After an examination of what Greek international arbitration entailed in practice, the annotation focuses on why international arbitration failed to prevent the Peloponnesian War. The piece ultimately argues that it was the Greeks' failure to treat arbitration as an international legal obligation which led to the practice's failure as a tool of conflict resolution during the Peloponnesian War.

This sample was submitted to several rounds of editing and revision before publication. This piece was published online in Volume 55, Number 1 of the Journal of International Law and Politics' Online Forum and can be found at: https://www.nyujilp.org/wp-content/uploads/2023/01/Shoemaker-OA-1.pdf.

Ancient Greek Arbitration: Practices, Failures, and the Decline of the Greek World

I. Introduction

Before Athens and Sparta went to war in 431 BCE, the Ancient Greek world was thriving. The Greek city-states had routed the Persians in two separate engagements. Greek traders plied the waters of the Mediterranean and Black Seas, and even further afield, bringing immense wealth to the Greek world. The Greek states continued their movement towards democracy, led by the Athenians. They had developed a nascent form of international law, illustrated, for example, by rules of war and, more tellingly, by a willingness to submit intercity disputes to arbitration by a third, neutral *poleis*.[1] Yet, by the end of the Peloponnesian War in 404, the Greek world was militarily weak. The regional hegemon Sparta, impoverished by three decades of conflict, was dependent on Persian support,, while across the *poleis* the tendency towards democracy declined, leaving oligarchies on the ascent.[2] Mechanisms for arbitration in both 446/445 BCE's Thirty Years' Peace, and in 421 BCE's Peace of Nicias were ignored in favor of conflict, leading to the devastation of the Greek world and its eventual supplanting by other, more powerful neighbors.

This annotation focuses on the Greek practice of intercity arbitration as a means of dispute resolution and, in particular, on the role that the failure of arbitration to either prevent the outbreak of the Peloponnesian War in 431, or permanently end it in 421, contributed to the decline of the Greek world. It begins with an examination of Greek intercity arbitration as it generally existed prior to the Peloponnesian War, and then turns to the Thirty Years' Peace and Peace of Nicias and their arbitration clauses. Finally, it examines why these arbitration clauses failed to prevent armed conflict between Athens and Sparta, arguing that the Greeks likely did

[1] The English transliteration of the Greek word for "city."
[2] *See generally* Donald Kagan, The Peloponnesian War (Penguin Books 2003).

not see the practice as constituting an analogue to customary international law, and certainly did not see it as possessing *opinio juris*. This cursory treatment of arbitration fueled the outbreak and continuation of the Peloponnesian War, and ultimately the decline of the Greek city-states.

II. International Arbitration in Ancient Greece: An Overview

"By 500 B.C., arbitration had near universal acceptance among Greek states,"[3] and by the time of the Peloponnesian War the procedure was broadly understood and centuries old, with one particularly ancient and unsuccessful appeal to arbitration dating back to roughly 750 BCE.[4] There were two main avenues through which Greek arbitration generally occurred.[5] The first was through a *compromissum*, or arbitration clause, in an agreement between two states.[6] For example, the 418 BCE peace between the cities of Sparta and Argos included as its first clause: "I. They shall submit to arbitration on fair and equal terms, according to their ancestral customs."[7] This form of *compromissum* was also found both in the Thirty Years' Peace and in the Peace of Nicias. The second main avenue through which arbitration could occur was through "the intervention of a third party," such as a city-state intervening in an armed conflict between two other states and forcing mediation.[8]

If a *compromissum* was the basis for the arbitration, the text of the treaty would sometimes include a procedure for choosing an arbitrator, but this was uncommon, especially around the time of the Peloponnesian War.[9] If no specific procedure was delineated, the city-states would come to an ad hoc agreement for selecting an arbitrator, sometimes resorting to

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[3] Henry T. King, Jr. & Marc A. LeForestier, *Arbitration in Ancient Greece*, 49 Dis. Res. J. 38 at 38 (Sept. 1994). *See also* Marcus Niebuhr Tod, International Arbitration Amongst the Greeks 7-52 (1913) (providing an impressive list of 82 arbitral decisions and treaties in Ancient Greece).
[4] W.L. Westermann, *Interstate Arbitration in Antiquity*, 2 Classical J. 197, 199 (Mar. 1907).
[5] King and LeForestier*, supra* note 3, at 40.
[6] *Id.* at 40.
[7] *Id.* at 41 (quoting Thucydides (Benjamin Jowett, trans., 1900) at v. 77).
[8] *Id.* at 41.
[9] *Id.*

lots to choose the arbitrating city.[10] Similar to contemporary arbitration, the Greek cities valued factors such as a "lack of jealousy or prejudice; friendship or kinship; reputation for good faith and moral excellence; and geographical proximity" when selecting their arbitrating city.[11]

Once the arbitrating city was chosen, it usually appointed the arbiters, who were then required to take oaths.[12] The arbiters were only permitted to address the specific dispute for which they were summoned.[13] After a hearing, replete with counsels, advocates, and witnesses, the arbitral tribunal would issue its final, unappealable ruling.[14] This is the context in which the arbitral clauses were included in the Thirty Years' Peace and the Peace of Nicias.

III. Arbitration Clauses in the Thirty Years' Peace and the Peace of Nicias

At the end of the "First Peloponnesian War" in 446/445 BCE, the Thirty Years' Peace treaty was signed between Athens and Sparta.[15] The events of the First Peloponnesian War are beyond the scope of this paper, but the terms of the agreement ending the conflict lie at its heart. The Thirty Years' Peace divided the Greek world in two, between the Spartan-led Peloponnesian League and the Athenian-led Delian League.[16] The most important clause in the agreement for the purpose of this annotation was a *compromissum* that "required both sides to submit future grievances to binding arbitration."[17]

The respect both the Athenians and the Spartans held for the *compromissum* became clear fifteen years later in 432/431 BCE, when disputes broke out once again between Athens and Sparta. With tensions flaring, the Athenians appealed to the Spartans "not to dissolve the treaty, or to break your oaths, but to have our differences settled by arbitration according to our

[10] *Id.*
[11] *Id.* (citing Marcus Niebuhr Tod, International Arbitration Amongst the Greeks 86-87 (1913)).
[12] *Id.* at 41-42.
[13] *Id.* at 42.
[14] *Id.* at 42-43.
[15] Kagan, *supra* note 2, at 17-18.
[16] *Id.* at 18.
[17] *Id.*

agreement."[18] The Spartans also held respect for the *compromissum*, with one of their kings, Archidamus, urging in response to the Athenian offer that the Spartans "send envoys to Athens…this must be done because the Athenians have offered arbitration, and it is against our laws to make an immediate attack against someone offering arbitration."[19] The subsequent breakdown of the Thirty Years' Peace saw both states hurtle into the conflagration that would become known as the famous Peloponnesian War, the Spartans, a famously superstitious people, blamed, in part, their own refusal to abide by arbitration as the cause of "their misfortune…and took to heart seriously…whatever else had befallen them."[20]

In 421 BCE, Athens and Sparta once again agreed to a truce and signed the Peace of Nicias, marking the end of the first half of the Peloponnesian War.[21] It contained a similar, if undetailed, *compromissum* mandating arbitration, which read:

> IV. They shall not be allowed to bear arms to the hurt of one another in any way or manner; neither the [Spartans] and their allies against the Athenians and their allies, nor the Athenians and their allies against the [Spartans] and their allies; and they shall determine any controversy which may arise between them by oaths and other legal means in such sort as they shall agree.[22]

The inclusion of the *compromissum* clauses in the Thirty Years' Peace and the Peace of Nicias should not be understood as groundbreaking additions to treaties as means of avoiding armed conflict, but rather as representative of treaty clauses being a longstanding practice steeped in the Greek world. However, despite the respect shown for the arbitration clauses by both states, their entrenched interests ultimately rendered the clauses inoperable such that they were never activated.

IV. The Failures of the Thirty Years' Peace *Compromissum*

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[18] Thucydides, History of the Peloponnesian War 49 (Richard Crawley trans.) (2003).
[19] Donald Kagan, The Outbreak of the Peloponnesian War 303-304 (Cornell University Press 2013).
[20] Thucydides, *supra* note 18, at 381.
[21] King and LeForestier, *supra* note 3, at 40, 45.
[22] *Id.* at 45 (quoting Thucydides (Benjamin Jowett, trans., 1900) at v. 18).

The factors leading to the failure of the Thirty Years' Peace *compromissum*, despite the mutual weight both the Athenians and the Spartans assigned to it, are best exemplified by two episodes, one involving the Greek states of Corinth and Corcyra and the other involving Sparta and Athens.

The first of these episodes, the dispute between Corinth and Corcyra, was not an isolated conflict between two lone city-states. While Corcyra was a member of neither the Delian nor Peloponnesian League, Corinth was a leading member of the Peloponnesian League.[23] The dispute, taking place between 436 and 433, involved a struggle for influence over the city of Epidamnus, located in what is now modern-day Albania and not far from Corcyra itself.[24] During the course of the crisis, Corinth garrisoned Epidamnus as the Corcyraeans besieged the city.[25] When word reached Corcyra that the Corinthians were preparing a substantial relief force, Corcyra, while not bound by the Thirty Years' Peace and its *compromissum* as a neutral state, appealed to the Corinthians for arbitration and offered to submit the matter to a mutually agreeable city in the Peloponnese.[26] After haggling over who should depart the city first, the besiegers or the besieged, and in spite of Spartan support for a mediated settlement, the Corinthians refused the offer and declared war.[27]

As the crisis escalated, Corcyra sought an alliance with Athens and, upon traveling to the city in 433, the Corcyraean delegates were met by a party of Corinthians who also sought to make their case to the Athenians.[28] Both parties relayed arguments for and against arbitration. The Corcyraeans first denounced the Corinthians for their refusal to agree to arbitration: "[The Corinthians] chose to prosecute their complaints [by] war rather than by a fair trial. And let their

[23] KAGAN, *supra* note 2, at 25-28.
[24] THUCYDIDES, *supra* note 18, at 24; KAGAN, *supra* note 2, at 25-28.
[25] *Id.* at 24.
[26] *Id.* at 24.
[27] *Id.* at 25; KAGAN, *supra* note 2, at 28-29.
[28] KAGAN, *supra* note 2, at 30-31.

conduct towards us…be a warning to you not to be misled by their deceit, nor to yield to their direct requests."[29] The Corcyraeans grounded their argument in a moral condemnation of the Corinthians as being deceitful for their refusal to engage in arbitration, and in a practical consideration for the Athenians. That is, if the Corinthians could not be trusted to submit to arbitration in place of war, what could they be trusted to do? The Corcyraeans' lofty argument notwithstanding, the Corinthian retort exposes more clearly how both parties viewed arbitration:

> As to [Corcyra's] allegation that they wished the question to be first submitted to arbitration, it is obvious that a challenge coming from the party who is safe in a commanding position cannot gain the credit due only to him who, before appealing to arms, in deeds as well as words, places himself on a level with his adversary. In their case, it was not before they laid siege to the place, but after they at length understood that we should not tamely suffer it, that they thought of the specious word arbitration.[30]

The Corinthians made clear that they viewed arbitration not as a practice to which they were legally bound to follow, but rather as just one of many diplomatic and military tools available to them as a leading Greek city. As such, arbitration for Corinth could not be accepted while Corcyra was in the commanding position of besieging Corinthian forces in Epidamnus. This point is further demonstrated by the historian Donald Kagan, who suggests that Corcyra's offer for arbitration was itself poisoned.[31] The Spartans were eager to take part in an arbitration where they might force their Corinthian allies to withdraw.[32] Allowing a Peloponnesian city, likely under Spartan influence, to arbitrate would guarantee this result.[33] With Corinthian interests so threatened, they could not possibly accede to the agreement proposed by Corcyra.

The second episode exemplifying the factors leading to the failure of the Thirty Years' Peace agreement's arbitral clause involved Athens and Sparta directly and is also illustrative of

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[29] THUCYDIDES, *supra* note 18, at 28.
[30] *Id.* at 31.
[31] Kagan, supra note 2, at 28.
[32] *Id.*
[33] Id.

how opportunities for arbitration were often ignored when the key interests of Greek cities were threatened. In Sparta, the question of whether to submit to Athenian arbitration in 432/431 BCE as the two states and their alliances began their march to war was fraught. Begun by a dispute over the city of Potidaea, a Corinthian colony and former Athenian ally, this crisis would eventually lead to the outbreak of the Peloponnesian War.[34] Both the Corinthians and Athenians appealed to the Spartans; the Corinthians for war and the Athenians for peace.[35] The question split Sparta. One of Sparta's two kings argued for arbitration:

> As for the Athenians, send to them on the matter of Potidaea, send on the matter of the alleged wrongs of the allies, particularly as they are prepared with legal satisfaction; and to proceed against one who offers arbitration as against a wrongdoer, law forbids. Meanwhile do not omit preparation for war. This decision will be the best for yourselves, the most terrible to your opponents.[36]

The response of one of Sparta's ephors,[37] however, won the day and is demonstrative of Spartan logic:

> Others have much money and ships and horses, but we have good allies whom we must not give up to the Athenians, nor by lawsuits and words decide the matter, as it is anything but in word that we are harmed, but render instant and powerful help. And let us not be told that it is fitting for us to deliberate under injustice; long deliberation is rather fitting for those who have injustice in contemplation. Vote therefore, [Spartans], for war.[38]

The ephor's response makes clear Sparta's position. Sparta had already sided against its ally Corinth in its prior dispute with Corcyra. If it did so again, the sanctity of the Peloponnesian League would be threatened and, through this, Sparta's leading role in Greece.[39] Once again, self-interest trumped commitment to intercity arbitration.

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[34] THUCYDIDES, *supra* note 18, at 42.
[35] *Id.* at 42-49.
[36] *Id.* at 52.
[37] Sparta elected five ephors annually who "received foreign envoys, negotiated treaties, and ordered expeditions once war had been declared." KAGAN, *supra* note 2, at 7.
[38] THUCYDIDES, *supra* note 18, at 52.
[39] *See* KAGAN, *supra* note 2, at 46.

V. Greek Arbitration's Failure in the Context of Modern Customary International Law

These two episodes show the key failure of Ancient Greek arbitration. In both conflicts, the cities involved implicitly or explicitly treated intercity arbitration, even one in which they were treaty-bound to participate, as a strategic option and not as an ancient analogue to customary international law.

Modern customary international law requires both a general practice by states and *opinio juris*.[40] To satisfy the general practice element, a "large share of the affected states [must] have engaged in" a particular practice, the practice must be fairly consistent, and the practice must have taken place over a substantial enough amount of time to give rise to a norm.[41] As discussed above, international arbitration amongst the Greek city-states possessed this kind of widespread practice. An exhaustive historical record exists pointing to the extensive use of arbitration in the Greek world for centuries, and the existence of general arbitral procedures is well known.[42]

Opinio juris, on the other hand, requires that the states engage in a practice out of a belief of "international legal obligation."[43] The Greek view of arbitration as just one of many strategic options, exemplified by these conflicts, is frequently testified to in the historical record and precludes an understanding of Greek arbitration as a legal obligation.[44] Even before the dissolution of the Thirty Years' Peace and the Peace of Nicias, there were numerous instances in which states would opt to either decline an appeal to arbitration, or otherwise refuse to be bound by an arbitral decision, particularly when emotions ran high or cities' critical interests were at

[40] *See e.g.,* Ryan Scoville, *Finding Customary International Law*, 101 Iowa L. R. 1893, 1895 (2016).
[41] *Id.* at 1895-1896 (quoting Andrew Guzman, *Saving Customary International Law*, 27 Mich. J. Int'l. L. 150, 155 (2005)).
[42] For a discussion of the widespread use of arbitration in Ancient Greece and common arbitral procedures *see generally* the sources discussed *supra* note 3.
[43] Scoville, *supra* note 40, at 1895.
[44] Westermann, *supra* note 4, at 200.

stake.[45] The failure of one of the first appeals to arbitration from the city of Messenia to the city of Sparta in 750 BCE is especially telling.[46] This particular appeal ended not only with a Spartan refusal of the Messenian offer for arbitration but also with the outbreak of a war between the two states.[47] In a similar manner, after the disastrous Spartan defeat at Leuctra in 371 BCE by the Thebans, the Spartans refused the Theban offer for mediation by the neutral Achaeans.[48] As the noted historian of Ancient Greece William Westerman, commented, this defeat, which shattered Spartan hegemony over the Greek world, left too many bitter feelings for the Spartans to possibly accede to a request for arbitration.[49] The conduct of the Spartans here, and of Greeks elsewhere through their history, demonstrates that they never regarded arbitration as possessing *opinio juris*. Hard feelings, state interest, or plain stubbornness were all used to justify states disregarding arbitration. There was, simply put, no feeling of international obligation on the part of the Ancient Greeks to engage in arbitration when their interests or pride were potentially impinged.

VI. Conclusion

With the weight of the Spartan and Corinthian interests at stake, it is unsurprising that the cities refused offers of arbitration before the outbreak of the Peloponnesian War. For these powers, intractable interests were at stake which they were not willing to risk before a third party. Thus, their commitment to arbitration did not extend to a form of nascent, ancient *opinio juris*. Rather, they treated arbitration as a tool, the utility of which could only extend so far. Such logic also explains why the *compromissum* in the Peace of Nicias never proved viable:

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[45] *Id.* at 201.
[46] *Id.* at 199-200.
[47] *Id.* at 199.
[48] *Id.*; Polybius, The Histories 340 (William Paton trans.) (1922).
[49] Westerman, *supra* note 4, at 201.

competing interests and distrust ensured that the peace was nothing more than a stopgap measure, destined to fail.[50]

It was this unwillingness by the Greek states to treat arbitration as legally binding which underwrote the practice's failure at critical moments in 432/431 BCE and in 421 BCE, thereby leading the Greek states to opt for war instead of arbitration. Had arbitration proved successful in averting the Peloponnesian War, perhaps the Greeks would not have ended their Golden Age, and Greek preeminence would have continued uninterrupted. As it stands, the Greek failure to arbitrate contributed to their eventual subjugation, first by the Macedonians, and then by the Romans, which relegated the Greeks to centuries of foreign domination.

[50] King and LeForestier*, supra* note 3, at 45.